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Security Council

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Letter dated 12 April 2011 from the Secretary-General addressed to the President of the Security Council

I have the honour to convey the attached communication dated 11 March 2011 (see annex), which I have received from the Registrar of the International Criminal Court (ICC), transmitting notification of the "Decision on the Confirmation of Charges" issued by Pre-Trial Chamber I of the International Criminal Court on 7 March 2011 in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (see enclosure). The Pre-Trial Chamber ordered the Registrar to notify the Security Council of its decision on the above case.

This case is one of four cases arising out of the referral by the Security Council, in its resolution 1593 (2005) of 31 March 2005, of the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court.

(*Signed*) **BAN** Ki-moon

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Annex

Note verbale dated 11 March 2011 from the Registrar of the International Criminal Court addressed to the Secretary-General

The Registrar of the International Criminal Court presents her compliments to the Secretary-General of the United Nations and has the honour to notify the Secretary-General of the United Nations, for onward transmission to the Security Council, of the "Decision on the Confirmation of Charges" (ICC-02/05-03/09-121-Corr-Red) issued by Pre-Trial Chamber I, in the case of *The Prosecutor v. Abdallah Banda Abakaer and Saleh Mohammed Jerbo Jamus*. The said Decision, dated 7 March 2011, is communicated in its original English version.

Please note that in the above-mentioned decision, the Chamber ordered the Registrar to notify the following entities of this decision: (a) the United Nations Security Council; (b) the Host State authorities; and (c) the Sudanese authorities.

The Chamber further indicated that the parties may apply for leave to appeal, specifying that "the five-day deadline provided under rule 155(1) of the Rules of Procedure and Evidence of the Court to lodge an application for leave to appeal this decision shall start to run with effect from the date of the notification of the authoritative English version to the parties".

The present communication is made in compliance with the Court's above-mentioned decision and in application of article 5(1)(b)(i) of the Relationship Agreement between the International Criminal Court and the United Nations.

Any query can be referred to Mr. Giovanni Bassu, Special Adviser on External Relations and Cooperation, by e-mail (giovanni.bassu@icc-cpi.int) or by telephone (+31 70 515 8631) or to Ms. Anne-Aurore Bertrand, Cooperation Adviser, by e-mail (anneaurore.bertrand@icc-cpi.int) or by telephone (+31 70 515 8202).

The Hague, 11 March 2011

Enclosure

Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/05-03/09**
Date: **7 March 2011**

PRE-TRIAL CHAMBER I

Before: **Judge Cuno Tarfusser, Presiding Judge**
Judge Sylvia Steiner
Judge Sanji Mmasenono Monageng

SITUATION IN DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR V. ABDALLAH BANDA ABAKAER NOURAIN AND SALEH MOHAMMED JERBO JAMUS*

Public Redacted Version

Corrigendum of the "Decision on the Confirmation of Charges"

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Mr Luis Moreno-Ocampo
Ms Fatou Bensouda
Mr Essa Faal

Counsel for the Defence
Mr Karim A.A. Khan
Mr Andrew J. Burrow

Legal Representatives of Victims
Mr Brahima Koné
Ms Hélène Cissé
Mr Akin Akinbote
Mr Frank Adaka
Sir Geoffrey Nice & Mr Rodney Dixon

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Deputy Registrar
Mr Didier Preira

Victims and Witnesses Unit
Ms Maria Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations Section
Ms Fiona McKay

Others

No. **ICC-02/05-03/09** 275 **7 March 2011**

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PRE-TRIAL CHAMBER I of the International Criminal Court ("Chamber" and "Court", respectively), having held on 8 December 2010 the hearing on the confirmation of charges in the case of ***The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Case")***, charged by the Prosecutor as follows:[1]

"On 29 September 2007, at the MGS Haskanita in Haskanita Village, Um Kadada Locality in North Darfur, the Sudan, in the context of and associated with an internal armed conflict, **BANDA and JERBO** together with JEM Splinter Group, SLA Unity and SLA Abdul Shafie forces under their command and control, acting pursuant to a common plan and orders issued by them, jointly with their forces,

I. attacked the MGS Haskanita and killed twelve (12) AMIS peacekeeping personnel and attempted to kill eight (8) AMIS peacekeeping personnel, with the knowledge that they were (1) personnel involved in a peacekeeping mission established in accordance with the UN Charter; and (2) taking no active part in hostilities and thus entitled to the protection given to civilians under the international law of armed conflict, thereby committing a crime in violation of Articles 8(2)(c)(i) and 25(3)(a) and 25(3)(f) of the Rome Statute **(Count 1: Violence to Life and Attempted Violence to Life (article 8(2)(c)(i) and Article 25(3)(a) and Article 25(3)(f) of the Rome Statute)**;

II. intentionally directed attacks against AMIS peacekeeping personnel, installations, materials, units and vehicles involved in a peacekeeping mission established in accordance with the Charter of the United Nations, which were entitled to the protection given to civilians and civilian objects under the international law of armed conflict, with the knowledge of the factual circumstances that established that protection, thereby committing a crime in violation of Articles 8(2)(e)(iii) and

[1] ICC-02/05-03/09-79-Red, para. 162.

25(3)(a) of the Rome Statute **(Count 2: Intentionally directing attacks against personnel, installations, materials, units and vehicles involved in a peacekeeping mission (Articles 8(2)(e)(iii) and 25(3)(a) of the Rome Statute)**;

III. attacked the MGS Haskanita and appropriated property belonging to AMIS and its personnel including vehicles, refrigerators, computers, cellular phones, military boots and uniforms, fuel, ammunition and money, without the consent of the owners and for their private or personal use, thereby committing a crime in violation of Articles 8(2)(e)(v) and 25(3)(a) of the Rome Statute **(Count 3: Pillaging (Article 8(2)(e)(v) and Article 25(3)(a) of the Rome Statute)."**[2]

HEREBY RENDERS THE FOLLOWING DECISION.

I. FACTUAL BACKGROUND AND CHARGES

1. In the "Document Containing the Charges Submitted Pursuant to Article 61(3) of the Statute" ("DCC"),[3] the Prosecutor alleges that, at about 7 p.m. on 29 September 2007, about 1000 troops from the Justice and Equality Movement-Splinter Group ("JEM-Splinter Group") and the Sudan Liberation Army-Unity ("SLA-Unity") and the Sudan Liberation Army-Abdul Shafie ("SLA-Abdul-Shafie") forces, led by Abdallah Banda Abakaer Nourain ("Abdallah Banda") and Saleh Mohammed Jerbo Jamus ("Saleh Jerbo") and other unit commanders, in a convoy of approximately 30 vehicles and armed with various types of weapons ("including 106 calibre weapons, dushkas, AK-47s, anti aircraft weapons and rocket propelled grenades"), launched "a surprise attack" on the military observer group

[2] Ibid.
[3] ICC-02/05-03/09-79-Red.

site established by the African Union ("AU") Mission in Sudan ("AMIS") at Haskanita ("MGS Haskanita").[4]

2. The DCC further alleges that ten AMIS peacekeepers personnel were shot and killed during the attack, that two more died later from injuries sustained during the attack and that at least other eight AMIS peacekeepers personnel sustained severe injuries as a result of being shot at by the attackers.[5]

3. Additionally, the DCC alleges that, during the attack, the troops of the JEM-Splinter Group and the SLA-Unity also engaged in large-scale looting of the MGS Haskanita camp, appropriating property belonging both to the AMIS and to its personnel, including about 17 vehicles, ammunition and weapons, large quantities of fuel, food, refrigerators, laptops, cell phones, Thuraya satellite phones, video cameras, uniforms, jewellery, mattresses, suitcases, tents and money belonging to the AMIS personnel and money from the safe deposit box of the Pacific Architects and Engineers ("PAE").[6]

4. The Prosecutor also alleges that "the attackers knew that the personnel attacked and the looted items were personnel/materials involved in a peacekeeping mission established in accordance with the UN Charter and were taking no active part in hostilities and thus entitled to the protection given to civilians under the international law of armed conflict".[7]

5. Accordingly, the Prosecutor charges Abdallah Banda and Saleh Jerbo with the war crimes of :

I. violence to life and attempted violence to life, within the meaning of articles 8(2)(c)(i), 25(3)(a) and 25(3)(f) of the Rome Statute ("Statute");

[4] ICC-02/05-03/09-79-Red, para. 72.
[5] ICC-02/05-03/09-79-Red, para. 84.
[6] ICC-02/05-03/09-79-Red, para. 85.
[7] ICC-02/05-03/09-79-Red, para. 162, (iii).

II. intentionally directing attacks against personnel, installations, materials, units and vehicles involved in a peacekeeping mission, within the meaning of articles 8(2)(e)(iii) and 25(3)(a) of the Statute; and

III. pillaging, within the meaning of articles 8(2)(e)(v) and 25(3)(a) of the Statute.

II. THE SUSPECTS

Abdallah Banda

6. Abdallah Banda is a Sudanese citizen of Zaghawa ethnicity, born in 1963 in Tina, North Darfur, Sudan, and currently based in North Darfur. During his first appearance before the Court, he stated that he was "a revolutionary".[8]

Saleh Jerbo

7. Saleh Jerbo is a Sudanese citizen of Zaghawa ethnicity, born in 1977 in Shegag Karo area in Kutum, North Darfur. During his first appearance before the Court, he stated that he was a "member of the Revolutionary Movement in Darfur".[9]

III. MAJOR PROCEDURAL STEPS

8. The case of Abdallah Banda and Saleh Jerbo stems from the same application that triggered the case of *The Prosecutor v. Bahar Idriss Abu Garda* ("Abu Garda Case"). On 20 November 2008, the Prosecutor submitted the "Prosecutor's Application under Article 58" ("Prosecutor's Application")[10] requesting the issuance of warrants of arrest for Bahar Idriss

[8] ICC-02/05-03/09-T-4-ENG, p. 7, lines 8-19.
[9] ICC-02/05-03/09-T-4-ENG, p. 11, lines 1-4.
[10] ICC-02/05-02/09-46.

Abu Garda ("Abu Garda"), Abdallah Banda and Saleh Jerbo,[11] alleging that they were criminally responsible for the war crimes of (1) violence to life (in the form of murder and causing severe injury to peacekeepers) under article 8(2)(c)(i) of the Statute; (2) intentionally directing attacks against personnel, installations, materials, units or vehicles involved in a peacekeeping mission established in accordance with the United Nations ("UN") Charter under article 8(2)(e)(iii) of the Statute; and (3) pillaging under article 8(2)(e)(v) of the Statute; crimes which had all been committed during the alleged attack on the MGS Haskanita on 29 September 2007.

9. On 23 February 2009, the Prosecutor provided additional information on his Application and indicated that summonses to appear would be sufficient to ensure the appearance of the three individuals before the Court.[12]

10. On 7 May 2009, the Chamber issued a first summons to appear for Abu Garda for his alleged criminal responsibility for the war crimes under articles 8(2)(c)(i), 8(2)(e)(iii) and 8(2)(e)(v) of the Statute.[13] Abu Garda first appeared before the Chamber on 7 May 2009.[14]

11. Between 19 and 30 October 2009, the Chamber held the hearing for the confirmation of charges in the Abu Garda Case. On 8 February 2010, the Chamber declined to confirm the charges against Abu Garda, holding that the evidence submitted was not sufficient to establish substantial grounds to believe that he could be held criminally responsible under article 25(3)(a) of the Statute for the crimes as charged.[15] Whilst concurring with the outcome of the decision, Judge Cuno Tarfusser appended a separate opinion in which he dissented from the reasoning developed by the Majority in support of its findings.[16]

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[11] ICC-02/05-02/09-46.
[12] ICC-02/05-206.
[13] ICC-02/05-02/09-1.
[14] ICC-02/05-02/09-T-2-ENG.
[15] ICC-02/05-02/09-243-Red.
[16] ICC-02/05-02/09-243-Red, pp. 99-103.

12. On 27 August 2009, the Chamber issued summonses to appear for Abdallah Banda and Saleh Jerbo, for their alleged criminal responsibility for the war crimes under articles 8(2)(c)(i), 8(2)(e)(iii) and 8(2)(e)(v) of the Statute.[17]

13. On 17 June 2010, Abdallah Banda and Saleh Jerbo first appeared before the Chamber pursuant to article 60 of the Statute.[18] They were informed of the crimes they were alleged to have committed and of their rights under the Statute and the Rules of Procedure and Evidence ("Rules"). The confirmation hearing, originally scheduled to commence on 22 November 2010, was subsequently postponed until 8 December 2010.[19]

14. On 29 June 2010, the Chamber issued its "Decision on issues relating to disclosure", setting out the principles and the time-frame for the disclosure of evidence between the parties and its communication to the Chamber for the purposes of the confirmation hearing.[20]

15. On 29 July 2010, Single Judge Cuno Tarfusser issued his "First decision on redactions", in which he granted a number of protective measures concerning, *inter alia*, redaction of witness statements and non-disclosure of certain witnesses' identities to the Defence and/or the public.[21]

16. On 19 October 2010, the Prosecutor filed the DCC and, on 22 October 2010, submitted the list of evidence.[22]

17. On 19 October 2010, the "Joint Submission by the Office of the Prosecutor and the Defence as to Agreed Facts and submissions regarding modalities for the conduct of the Confirmation Hearing" ("Joint Submission") was filed.[23] In addition to indicating that "the

[17] ICC-02/05-03/09-1.
[18] ICC-02/05-03/09-T-4-ENG.
[19] ICC-02/05-03/09-81.
[20] ICC-02/05-03/09-49.
[21] ICC-02/05-03/09-58.
[22] ICC-02/05-03/09-84 [REDACTED]. The list was amended on 18 November 2010: ICC-02/05-03/09-104 [REDACTED].
[23] ICC-02/05-03/09-80.

Defence [did] not contest any of the material facts alleged in the DCC for the purposes of confirmation",[24] the Joint Submission also specified that the suspects were willing to waive their right to be present at the confirmation hearing.[25] The parties further indicated that neither of them wished to call witnesses and that only the Prosecutor would make an oral presentation.[26]

18. On 29 October 2010, the Chamber issued its "Decision on victims' participation at the hearing on the confirmation of the charges", wherein it set forth the participatory rights of victims at the confirmation hearing and in the proceedings leading thereto. Eighty-nine (89) victims were authorised to participate in the confirmation hearing and were granted access to the public record of the Case, the DCC and the Joint Submission.[27]

19. On 4 November 2010, the Defence submitted a written request on behalf of Saleh Jerbo, waiving his right to be present at the confirmation hearing in accordance with rule 124 of the Rules.[28] On 15 November 2010, a request to the same effect was submitted on behalf of Abdallah Banda.[29]

20. On 6 December 2010, the "Prosecution's written submissions for the purpose of the Confirmation Hearing pursuant to article 61 (5)" was filed.[30]

21. The confirmation hearing was held before the Chamber on Wednesday 8 December 2010.[31] In accordance with the Joint Submission, the Prosecutor presented a summary of his evidence, whilst the Defence did not present evidence, nor did it challenge the evidence presented by the Prosecutor or otherwise respond. The Victims' Legal Representatives submitted their views. In accordance with the established practice of the

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[24] Ibid., para. 5.
[25] Ibid., para. 9.
[26] Ibid., para. 7.
[27] ICC-02/05-03/09-89.
[28] ICC-02/05-03/09-93 [REDACTED].
[29] [REDACTED].
[30] ICC-02/05-03/09-112 [REDACTED].
[31] [REDACTED] ICC-02/05-03/09-T-9-Red-ENG CT.

Court, the Chamber authorised the parties and participants to submit their final written observations: the Prosecutor and the Victims' Representatives no later than 17 December 2010, and the Defence no later than 4 January 2011.

22. On 16 December 2010, Ms Hélène Cissé, Legal Representative of Victims a/0434/09, a/0435/09, a/0456/09, a/0457/09, a/0458/09, a/0459/09, a/0460/09, a/0461/09, a/0462/09, a/0463/09, a/0579/09, a/0580/09, a/0655/09, a/0656/09, a/0736/09, a/0737/09, a/0738/09, a/0739/09, a/0740/09, a/0741/09, a/0754/09, submitted her observations.[32]

IV. RELATIONSHIP BETWEEN THE PRESENT CASE AND THE ABU GARDA CASE AND RELEVANT PROVEN FACTS RELATING TO THE GEOGRAPHICAL AND HISTORICAL BACKGROUND OF THE CHARGES

23. For the purposes of this decision, the Chamber highlights from the outset that the background of the Case is the same as that of the Abu Garda Case. Accordingly, the Chamber will refer, where appropriate, to the Decision on the Confirmation of Charges in the Abu Garda Case ("Abu Garda Decision")[33] and will refrain from revisiting issues or discussing arguments which were exhaustively addressed in that decision, supported by evidence tendered in the present case, and were not contended or otherwise challenged in these proceedings, insofar as those issues are also of relevance in determining whether the charges in the present case should be confirmed.

24. As already established in the Abu Garda Decision, the Chamber, in accordance with rule 69 of the Rules, will consider as proven the following:

I. the geographical parameters of the Darfur region in Sudan and the ethnic origin of its inhabitants;[34]

[32] ICC-02/05-03/09-104.
[33] ICC-02/05-02/09-243-Red.
[34] ICC-02/05-02/09-243-Red, para. 16.

II. that throughout the period from August 2002 until 10 September 2009 when the Document Containing the Charges in the Abu Garda Case ("DCC against Abu Garda")[35] was filed, an armed conflict not of an international character was waged in Darfur between the Government of Sudan ("GoS") together with forces under its control, on the one hand, and various armed rebel groups, on the other;[36]

III. the rebel groups included the JEM, a predominantly Zaghawa group established in 2001 under the chairmanship of Dr Khalil Ibrahim, and the Sudan Liberation Army/Movement ("SLA/M"), established in 2003 under the leadership of Abdul Wahid El Nour;[37]

IV. that in accordance with the "Agreement on the Modalities for the Establishment of the Ceasefire Commission and the Deployment of Observers in Darfur" signed on 28 May 2004 between the GoS, the JEM and the SLA/M, an AU Monitoring Mission was deployed in Darfur, essentially with the responsibility of monitoring and ensuring the implementation of the Humanitarian Ceasefire Agreement ("HCA") entered into on 8 April 2004 between the GoS, the JEM and the SLA/M;[38]

V. that in spite of the Darfur Peace Agreement ("DPA") concluded in Abuja, Nigeria, on 5 May 2006 between the GoS and a splinter faction of the SLA/M, the SLA/MM under the leadership of Minni Arko Minawi, the JEM and other factions of the SLA did not sign the DPA. Fighting therefore continued between the GoS and the SLA/MM,[39] on the one hand, and those rebel forces that had not signed the DPA, on the other.[40]

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[35] ICC-02/05-02/09-91-Red.
[36] ICC-02/05-02/09-243-Red, para. 17.
[37] ICC-02/05-02/09-243-Red, para. 17.
[38] ICC-02/05-02/09-243-Red, para. 18.
[39] See ICC-02/05-02/09-243-Red, p. 10, footnote 32, recalling that "Between October and November 2005, the SLA/M split into two factions: SLA/MM under the leadership of Minni Arko Minawi and SLA/AW under the leadership of Abdul Wahid El Nour. Later, further divisions appeared within SLA/AW and SLA/MM, leading to further splits into various rebel factions. In May 2007, during a conference held in Um Rai, North

V. JURISDICTION AND ADMISSIBILITY

25. Article 19(1) of the Statute requires the Chamber to satisfy itself that it has jurisdiction in any case brought before it. In its "Second Decision on the Prosecutor's Application under Article 58",[41] the Chamber engaged in a preliminary analysis of the issue of the jurisdiction of the Court in accordance with article 19(1) of the Statute and the precedent set by the Chamber, and found that the Case fell within the jurisdiction of the Court.[42]

26. No challenges to the jurisdiction of the Court under article 19(2) and (3) of the Statute and rule 58 of the Rules were brought, since the above mentioned Decision on the Prosecutor's Application under article 58 and no issues relating to the jurisdiction were raised. Accordingly, the Chamber is satisfied that the Case falls within the jurisdiction of the Court in accordance with articles 5, 11 and 13(b) of the Statute.

27. The Defence did not challenge the admissibility of the present Case. In the Abu Garda Decision, the Chamber found it appropriate to examine the issue of admissibility.[43] It noted that, according to the information provided by the Prosecutor, no State was acting, or had acted, in the manner described in article 17 of the Statute in relation to the facts alleged in the Abu Garda Case. As regards the gravity threshold, based on the information submitted by the Prosecutor, the Chamber found that the consequences of the alleged attack on the MGS Haskanita were grave both for the direct victims of it (that is, AMIS personnel and their families) and for the local population, in light of the initial suspension

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Darfur, commanders from the various breakaway factions came together and formed a united faction called SLA-Unity, under the leadership of Abdallah Yahya".

[40] ICC-02/05-02/09-243-Red, paras. 19-20.

[41] ICC-02/05-03/09-1.

[42] ICC-02/05-03/09-1, paras. 1-3.

[43] ICC-02/05-02/09-243-Red, paras. 27-34.

and ultimate reduction of AMIS activities in the area as a result of the attack.[44] Accordingly, it found that the case against Abu Garda was of sufficient gravity within the meaning of article 17(1)(d) of the Statute, and therefore admissible.[45]

28. In light of the above findings, and absent the submission of additional information by either the parties or the participants in this respect in the present Case, the Chamber finds that the case against Abdallah Banda and Saleh Jerbo is likewise admissible.

VI. SCOPE, OBJECT AND PURPOSE OF THE DECISION ON THE CONFIRMATION OF CHARGES

29. Article 61(7) of the Statute provides that, on the basis of the confirmation hearing, the Pre-Trial Chamber must determine "whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged".

30. In the Abu Garda Decision, the Chamber engaged in an in-depth discussion as to the meaning of the evidentiary threshold set in article 61(7) of the Statute.[46] The Chamber recalls and reiterates that analysis for the purposes of this decision.

31. Furthermore, this Chamber has previously clarified that the evidentiary standard established in article 61(7) of the Statute reflects the limited purpose of the confirmation hearing, which is to ensure that "only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought" are committed for trial.[47] Whilst protecting the rights of the Defence against "wrongful and wholly unfounded charges",[48] the pre-trial stage also follows the principle of judicial economy, in terms of preventing those cases that do not meet the requisite evidentiary standard at the pre-trial stage from proceeding to trial.

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[44] Ibid., para. 33.
[45] ICC-02/05-02/09-243-Red, para. 34.
[46] ICC-02/05-02/09-243-Red, paras. 35-43.
[47] ICC-01/04-01/06-803-tEN, para. 37; ICC-02/05-02/09-243, para. 39.
[48] ICC-01/04-01/06-803-tEN, para. 37; ICC-01/04-01/07-717, para. 63.

32. However, the relationship between the pre-trial phase and the trial phase of the proceedings goes beyond the filtering of cases by the Pre-Trial Chamber for the benefit of the Trial Chamber.

33. This is educed from article 74(2) of the Statute and regulation 55 of the Regulations of the Court ("Regulations"). Article 74(2) provides that "the decision at trial shall not exceed the facts and circumstances described *in the charges* and any amendments to the charges" (emphasis added). By the same token, regulation 55 of the Regulations vests the Trial Chamber with the authority to modify the legal characterisation of facts "without exceeding the facts and circumstances described *in the charges* and any amendments to the charges" (emphasis added).

34. On the one hand, these provisions specify that it is the "facts and circumstances" appearing in the confirmed charges, and in the confirmed charges alone, that determine the factual ambit of the case for the purposes of the trial and circumscribe it by preventing the Trial Chamber from exceeding that factual ambit.

35. On the other hand, the specific reference in these same provisions to "the facts and circumstances" makes it clear that it is only the factual, as opposed to the legal elements of the confirmed charges that have a delimiting function *vis-à-vis* the Trial Chamber. As regulation 55 of the Regulations explicitly states, the Trial Chamber is vested with unrestricted powers to retain, modify or otherwise amend the legal characterisation of the facts and circumstances appearing in the charges.

36. Conversely, these provisions make it clear that no delimiting or otherwise constraining power can be ascribed to facts and circumstances which, despite having been mentioned or dealt with at the pre-trial stage, do not appear in the charges as confirmed by the Chamber. These include, most notably, all the facts and circumstances that are referred to in the document containing the charges or in the decision on the confirmation of charges but do not appear in the confirmed charge as such. In particular, it is important

to bear in mind the distinction between, on the one hand, the facts and circumstances underlying the charges (that is, "the facts and circumstances described in the charges" within the meaning of article 74(2) of the Statute and regulation 55(1) of the Regulations) and, on the other hand, other facts which are not mentioned in the charge but which are subsidiary or otherwise related to them, in particular since proof of the material facts may be inferred from them. Furthermore, these subsidiary facts are also relevant to the extent that they provide background information.

37. This reasoning appears consistent with the approach followed by the Appeals Chamber, for which only the factual allegations which support each of the legal elements of the crime charged[49] qualify as "facts [...] described in the charges", and as such are to be distinguished from "the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61(5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged".[50] However useful these "other" facts might have been to the Chamber in determining whether the Prosecutor had presented evidence demonstrating a "clear line of reasoning underpinning [his] specific allegations",[51] and thus meeting the requisite standard of proof under article 61(7) of the Statute, they are, in principle, to be considered only as background information or as indirect proof of the material facts, and as such, are deprived of any limiting power *vis-à-vis* the Trial Chamber pursuant to article 74(2) of the Statute and regulation 55(1) of the Regulations.

38. In this respect, it is worth noting that the Pre-Trial Chamber is not required to confirm or not confirm the "document containing the charges" which is an instrument of

[49] It is understood that the "legal elements of the crime charged" include all the constitutive elements of such a crime as well as the objective and subjective elements of the mode of liability according to which the crime charged has been confirmed by the Chamber.

[50] ICC-01/04-01/06-2205, footnote 163.

[51] ICC-01/04-01/06-803-tEN, para. 39; ICC-01/04-01/07-717, para. 65; ICC 01/05-01/08-424, para. 29; ICC-02/05-02/09-243, para. 37.

an explanatory nature provided by the Prosecutor for the ultimate benefit of the Defence and the Chamber itself, and whose content, with the exception of the charges, is not the subject-matter of the decision on the confirmation of charges.

VII. EVIDENTIARY MATTERS

39. In line with its established case law, the Chamber, whilst assessing all of the evidence presented for the purposes of the confirmation hearing, will only make reference in this decision to specific items of evidence and specific facts which, in its view, support its findings as to whether there are substantial grounds to believe that the suspects committed any or all of the crimes charged by the Prosecutor.[52] Accordingly, the items of evidence and the facts referred to in the present decision are included for the sole purpose of providing the reasoning underpinning the Chamber's determination, without prejudice to the relevance of additional items of evidence or subsidiary facts that could also support the same findings.

40. This view is consistent with the fact that, given the limited purpose of the confirmation hearing, the evidentiary threshold at the pre-trial stage is lower than that applicable at the trial stage. Accordingly, article 61(5) of the Statute expressly provides that the Prosecutor may, for the purposes of the confirmation hearing, "rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial". In more general terms, the Prosecutor is not required to tender into the record of the case more evidence than is, in his view, necessary to convince the Chamber that the charges should be confirmed.

[52] ICC-01/04-01/07-717 para. 69; ICC-02/05-02/09-243-Red, para. 45.

41. The Chamber also reiterates those principles established in the Abu Garda Decision[53] as to the probative value of summaries of interviews of anonymous witnesses submitted by the Prosecutor. Of particular relevance to the present case are the following findings:

I. the use of summary evidence is expressly allowed by the legal instruments of the Court and, accordingly, the Prosecutor should not be unduly prejudiced as a result of using such evidence; and

II. with a view to preserving the rights of the Defence, statements of anonymous witnesses, whilst admissible, have to be evaluated on a case-by-case basis, depending on whether the information contained therein is corroborated or supported by other evidence presented into the case file.[54]

42. The Chamber further notes that a number of statements presented by the Prosecutor were given by insider witnesses. Many of these witnesses participated in the events alleged in the present case, including the alleged attack on the MGS Haskanita. In the circumstances, when examining these statements, the Chamber will assess such witnesses' testimony in light of the evidence presented as a whole.[55] When examining these statements, the Chamber will be mindful of the risks that attach to the evidence of insider witnesses and will therefore treat such evidence with caution.

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[53] ICC-02/05-02/09-243-Red, paras. 49-52.

[54] ICC-01/04-01/07-717, paras. 159-160, wherein the Chamber stated that "[w]hile there is no requirement *per se* that summaries of the statements of anonymous witnesses are corroborated in order for them to be admissible, the Chamber is of the view that lack of support or corroboration from other evidence in the record of the proceedings could affect the probative value of those summaries or statements".

[55] See similar view taken by Pre-Trial Chamber II in the case against Jean-Pierre Bemba: ICC-01/05-01/08-424, para. 57.

The joint submission and the "agreed facts"

43. On 19 October 2010, in their Joint Submission, the Prosecutor and the Defence informed the Chamber that the Defence did not contest any of the material facts alleged in the DCC for the purposes of confirmation and suggested that, consequently, the Pre-Trial Chamber might "consider such alleged facts to be proven for the purposes of the confirmation of the charges, in accordance with rule 69 of the Rules".[56] A copy of the DCC was attached as Annex A to the Joint Submission, "representing the uncontested material facts".[57]

44. Whilst taking note of the Joint Submission, the Chamber wishes to highlight that it will adopt a cautious approach *vis-à-vis* its contents for the following reasons.

45. First and foremost, it should be recalled that the proceedings leading to the confirmation hearing are not provided for the sole benefit of the parties. The aim of the procedural framework laid down in the Statute is to allow the facts alleged by the Prosecutor as forming the basis of the most serious criminal offences to be presented in full whenever either the interests of justice, which are paramount, or the interests of the victims, which are also critical, so require. Nowhere is this more apparent than in rule 69 of the Rules itself, which, whilst vesting the Chamber with the discretionary power to consider an uncontested fact as proven, by the same token allows the Chamber to disregard the parties' wishes and to order "a more complete presentation of the alleged facts", whenever such complete presentation "is required in the interests of justice, in particular the interests of the victims".

46. In addition, article 61(7) of the Statute, by using the word "shall", makes it clear that the determination as to "whether there is sufficient evidence to establish substantial

[56] ICC-02/05-03/09-80, para. 5.
[57] Ibid.

grounds to believe that the person committed each of the crimes charged" is an obligation of the Chamber, irrespective of whether the parties agreed on the facts of the case.

47. Finally, and more broadly, the Chamber takes the view that the document containing the charges submitted by the Prosecutor by its nature consists of a complex narrative in which issues of fact and issues of law are often intertwined; it is not always easy, therefore, to identify the domain to which each statement or allegation belongs. The fact that the parties failed to submit a specific list of agreed-upon and uncontested facts makes it necessary for the Chamber to adopt a cautious approach and to refer to the evidence submitted by the Prosecutor whenever appropriate for determining whether the required evidentiary threshold has been reached in respect of a specific factual circumstance.

VIII. ELEMENTS OF THE CRIMES

A. Contextual elements of the crimes

48. In accordance with the Elements of Crime, all the crimes charged by the Prosecutor equally require that (a) the conduct took place in the context of and was associated with an armed conflict not of an international character; and (b) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.

49. The DCC states that "[t]he war crimes alleged in Counts 1, 2 and 3 [...] occurred in the context of and were associated with a protracted period of armed conflict of a non-international character between the GoS together with forces under its control and the various armed rebel groups that operated in the Darfur region including the JEM Splinter Group and the SLA-Unity".[58] More specifically, the DCC alleges that these two groups, under the leadership of Abdallah Banda (the JEM Splinter Group) and Saleh Jerbo (the SLA-Unity), were engaged in the conflict against the GoS. On 29 September 2007 the plan

[58] ICC-02/05-03/09-79-Red, para. 92.

to attack the MGS Haskanita was devised and executed in the context of this conflict.[59] According to the DCC, both Abdallah Banda and Saleh Jerbo, given their roles as commanders of their respective groups, were well aware of the factual circumstances that established the existence of an armed conflict in Darfur at the time they planned and led the troops to attack the MGS Haskanita.[60]

50. As part of the DCC, the allegations as to the existence and nature of the conflict fall within the scope of the facts agreed between the Prosecutor and the Defence for the purposes of the confirmation hearing. Furthermore, the Chamber recalls that the Abu Garda Decision found that there were substantial grounds to believe that, at all times relevant to the charges, an armed conflict not of an international character existed in Darfur, and refrained from further analysing the evidence in that respect.[61]

51. The Chamber sees no reason to depart from that conclusion, especially bearing in mind that the background to the present case is identical to that of the Abu Garda Case. Accordingly, without engaging in an assessment of the evidence submitted in this respect, the Chamber confirms and reiterates its finding that there are substantial grounds to believe that all events relevant to the charges, occurred in Darfur, Sudan in the context of and were associated with an armed conflict not of an international character.

52. As regards the awareness of the factual circumstances establishing the existence of the conflict, the Chamber takes the view that, in light of the suspects' role as commanders of their respective groups,[62] there are substantial grounds to believe that they were both aware of those factual circumstances establishing the existence of the armed conflict.

[59] ICC-02/05-03/09-79-Red, para.95.
[60] ICC-02/05-03/09-79-Red, para. 98.
[61] ICC-02/05-02/09-243-Red, paras. 56-57.
[62] *See* infra paras. 141-142.

B. Existence of the offences under articles 8(2)(c)(i)-1, 8(2)(e)(iii) and 8(2)(e)(v) of the Statute

1. The occurrence of the attack on the MGS Haskanita

53. The Prosecutor alleges that on the morning of the 29 September 2007, the JEM Splinter Group and the combined SLA-Unity and SLA-Abdul Shafie forces sustained heavy losses, including personnel and equipment, when they were attacked by the GoS forces near their camp in Dalil Babiker.[63] As a result of this attack, the JEM Splinter Group and the combined SLA-Unity and SLA-Abdul Shafie forces withdrew from their camp and moved to another location nearby.[64] Shortly after the fighting ended Abdallah Banda and some JEM Splinter Group troops headed in the direction of the SLA-Unity base in Dalil Babiker. Abdallah Banda then carried on to a location where a meeting later took place.[65] At that location Abdallah Banda and Saleh Jerbo held a meeting with commanders and troops of JEM Splinter Group and SLA-Unity.[66] During this meeting, a plan to attack the MGS Haskanita compound was agreed upon.[67]

54. Based on the extensive evidence submitted by the Prosecutor, the Chamber in the Abu Garda Decision found that there were substantial grounds to believe that an attack was indeed directed against the MGS Haskanita at about 7 p.m. on the evening of 29 September 2007.[68] The occurrence of the attack, as well as its spatial and temporal

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[63] ICC-02/05-03/09-79-Red, paras. 65-66.
[64] Ibid., para. 66.
[65] Ibid., para. 67.
[66] Ibid., para. 68.
[67] Ibid., para. 69.
[68] ICC-02/05-02/09-243-Red, para. 105, referring to the following evidence: United Nations Security Council, *Security Council Presidential Statement Condemns Deadly Attack on Peacekeepers in Darfur, Says Any Attempt to Undermine Peace Process is Unacceptable*, SC/9135, 2 October 2007, DAR-OTP-0161-0072; International Crisis Group, *Darfur's New Security Reality*, Africa report No 134, 26 November 2007, DAR-OTP-0148-0461 at 0481; *African Peacekeepers Killed in Darfur Attack*, Sudan Tribune, 15 September 2008, DAR-OTP-0154-0138; *Darfur Attack Kills 10 AU Troops, Dozens Missing*, Reuters, 30 September 2007, DAR-OTP-0154-0366; Statement of Witness 420, DAR-OTP-0165-0521 at 0531, para. 52; Statement of Witness 446, DAR-OTP-0169-0808 at 0819, paras. 91-92; Statement of Witness 416, DAR-OTP-0165-0381 at 0388, para. 34; Statement of Witness 419, DAR-OTP-0165-0489 at 0504, paras. 73-74; Statement of Witness 417, DAR-OTP-0165-0424 at 0432, para. 37;

parameters, can also be considered as facts agreed upon by the Prosecutor and the Defence.

55. Furthermore, the occurrence of the attack on the MGS Haskanita was confirmed by a number of witnesses in this case,[69] some of whom also relayed details regarding the circumstances preceding[70] and following[71] the attack.

56. Accordingly, the Chamber finds that there are substantial grounds to believe that an attack was directed against the MGS Haskanita on the evening of 29 September 2007.[72]

2. The relationship between the crime charged under Count 2 and the crimes charged under Counts 1 and 3 of the DCC

57. In the Abu Garda Decision, the Majority noted that the offences alleged under articles 8(2)(c)(i) and 8(2)(e)(v) of the Statute, as described in Counts 1 and 3 of the DCC against Abu Garda, had allegedly been committed during and in the context of the attack on the MGS Haskanita on 29 September 2007.[73]

58. The Chamber reiterates its view that the offences listed under Counts 1 and 3 in the present case, which are the same as the ones in the Abu Garda Case, were allegedly

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Statement of Witness 447, DAR-OTP-0169-1160 at 1172, paras. 77-79. UN Security Council, *Report of the Secretary General on the Deployment of the African Union-United Nations Hybrid Operation in Darfur*, S/2007/596, DAR-OTP-0157-1318 at 1322, para. 19; *Peacekeepers in Darfur Hold Farewell Parade for Slain Troops*, available at http://www.guardiannewsngr.com/news/article02/051007, DAR-OTP-0152-0244; *Tribute to the Brave, AMIS Bids Farewell to "Soldiers-for-Peace"*, AMIS News Bulletin, 9 October 2007, DAR-OTP-0153-1860; *African Union Attacked, Seven Killed in Darfur*, Reuters, 30 September 2007, DAR-OTP-0154-0368; *U.N. Says Darfur Attack Shows Need for Robust Force*, 2 October 2007, DAR-OTP-0154-0378.

[69] Revised summary of Transcript of Interview of Witness 307, DAR-OTP-0171-0308, at 0313, para. 39: "They shouted and when they shouted like this, they attacked the African Union compound". Revised summary of Transcript of Interview of Witness 304, DAR-OTP-0171-0258, at 0272, para. 109.

[70] Summary of Statement of Witness 466, DAR-OTP-0179-0158 at 0159, para. 7 and at 0160, para. 12; Revised summary of Interview Transcript of Witness 304, DAR-OTP-0171-0258 at 0267, para. 77 et seq. Statement of Witness 442, DAR-OTP-0175-0002 at 0004, passim; Revised Summary of Interview Transcript of Witness 305, DAR-OTP-0171-0290 at 0290, para. 3; Summary of Interview Transcript of Witness 441, DAR-OTP-0179-0105 at 106, paras. 8 et seq.

[71] Revised summary of Transcript of Interview of Witness 304, DAR-OTP-0171-0258 at 0279, paras. 154 et seq. Summary of Interview of Witness 441, DAR-OTP-0179-0105 at 0113, paras. 40 et seq.

[72] ICC-02/05-02/09-243-Red, para. 105.

[73] Ibid., para. 59.

committed during and in the context of the attack on the MGS Haskanita. The Chamber's findings in relation to the offence charged under Count 2 will thus have legal consequences for its findings in relation to the alleged murders, both committed and attempted (Count 1) and to the alleged pillaging (Count 3). Accordingly, it will begin its analysis with Count 2 of the DCC. Only in the event that it establishes that there are substantial grounds to believe that both the objective and subjective elements of the crime listed under Count 2 are fulfilled will the Chamber proceed with the analysis of the elements of the crimes with which Abdallah Banda and Saleh Jerbo are charged by the Prosecutor under Counts 1 and 3 of the DCC. Where appropriate, the findings reached by the Chamber in the Abu Garda Decision relating to Count 2 will be referenced in this Decision.

3. Count 2: Intentionally directing attacks against personnel, installations, material, units and vehicles involved in a peacekeeping mission in accordance with the UN Charter

59. In **Count 2**, pursuant to article 8(2)(e)(iii) of the Statute, the Prosecutor charges Abdallah Banda and Saleh Jerbo as follows:

> On 29 September 2007, at the MGS Haskanita in Haskanita Village, Um Kadada Locality in North Darfur, the Sudan, in the context of and associated with an internal armed conflict, **BANDA** and **JERBO** together with JEM Splinter Group, SLA Unity and SLA Abdul Shafie forces under their command and control, acting pursuant to a common plan and orders issued by them, jointly with their forces intentionally directed attacks against AMIS peacekeeping personnel, installations, materials, units and vehicles involved in a peacekeeping mission established in accordance with the Charter of the United Nations, which were entitled to the protection given to civilians and civilian objects under the international law of armed conflict, with the knowledge of the factual circumstances that established that protection, thereby committing a crime in violation of Articles 8(2)(e)(iii) and 25(3)(a) of the Rome Statute.

60. The war crime provided for in article 8(2)(e)(iii) of the Statute is defined as "intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the

Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict."

61. The Chamber reiterates the Majority's legal interpretation of each of the elements of the crime provided for in article 8(2)(e)(iii) of the Statute[74] as set out in paragraphs 64 to 94 of the Abu Garda Decision. It will however conduct a factual analysis in order to establish whether each of the elements is supported by the evidence, in light of the legal interpretation given to them.

3.1 *Objective elements of the crime*

62. According to the Elements of Crimes, the following objective elements are required in order to constitute the crime provided for in article 8(2)(e)(iii) of the Statute: (i) the perpetrator directed an attack; (ii) the object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the UN; (iii) such personnel, installations, material, units or vehicles were entitled to the protection afforded to civilians or civilian objects under the international law of armed conflict.

63. In the context of its analysis of the objective elements of the crime charged under Count 2, the Abu Garda Decision examined the evidence in relation to the above-mentioned three objective elements. The Chamber finds it appropriate to refer to its findings in the Abu Garda Decision as regards facts which (i) were relevant to both the Abu Garda and the present case, (ii) were not contended or otherwise challenged in the present proceedings by the Defence and (iii) are supported by evidence presented in the

[74] Reference is made to the Elements of Crimes. The elements of whether "the conduct took place in the context of and was associated with an armed conflict not of an international character" and of the perpetrator's awareness of factual circumstances that established the existence of an armed conflict are dealt with in Section VIII, A), para. 51-52 of the present decision.

present case.[75] These conditions are met in respect of the above-mentioned three objective elements. Accordingly, the Chamber sees no reason to deviate from the factual findings reached in the Abu Garda Decision. It therefore recalls and incorporates in the present case the following relevant findings:

(i) there are substantial grounds to believe that an attack was directed against the MGS Haskanita on 29 September 2007;[76]

(ii) there are substantial grounds to believe that AMIS was involved in a peacekeeping mission in accordance with the UN Charter as it was established under the auspices of the African Union, a regional agency within the meaning of Article 52 of the UN Charter[77] with a mandate to maintain peace and security[78] and (a) was deployed with the consent of the parties to the conflict active at the time of the agreements;[79] (b) was impartial in its dealings with all parties to the conflict[80] and (c) its personnel were not allowed to use force except in self-defence;[81]

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[75] *See* supra para. 23.

[76] See supra Sec. VIII, B), 1), paras. 53-56.

[77] ICC-02/05-02/09-243-Red, paras. 120-125, referring *inter alia* to the following evidence also tendered in the present case, which demonstrates the UN Security Council's endorsement and support for the action of AMIS: Security Council Resolution 1556 (2004), 30 July 2004, DAR-OTP-0155-0002 at 0004, para.2, and at 0006, para.16; Security Council Resolution 1564 (2004), 18 September 2004 S/RES/1564 (2004), DAR-OTP-0152-0194 at 0195; Statement of the President of the Security Council, 21 December 2005 (S/PRST/2005/67), DAR-OTP-0164-0247; Statement of the President of the Security Council, 2 October 2007 (S/PRST/2007/35), DAR-OTP-0154-0561; See also Article 52(1) of the Charter of the United Nations, 24 October 1945, 1 UNTS XVI and article 3(e) of the Constitutive Act of the African Union, 11 July 2000.

[78] ICC-02/05-02/09-243-Red, para. 122, referring *inter alia* to the following evidence also tendered in the present case : *Communiqué of the Solemn Launching of the Tenth Meeting of the Peace and Security*, DAR-OTP-0154-0495 at 0496-0497; *Communiqué of the Seventh Meeting of the Peace and Security Council*, 20 October 2004, DAR-OTP-0154-0500 at 0501, para.4; Statement of Witness 315, DAR-OTP-0164-1159 at 1163, para.16.

[79] ICC-02/05-02/09-243-Red, para. 109, referring to the following evidence also tendered in the present case: Agreement with the Sudanese Parties on the Modalities for the Establishment of the Ceasefire Commission and the Deployment of Observers in Darfur, DAR-OTP-0005-0308 and DAR-OTP-0021-0261; Protocol between the Government of the Sudan (GoS), the Sudan Liberation Movement/Army (SLM/A), the Justice and Equality Movement (JEM) on the Enhancement of the Security Situation in Darfur in accordance with the N'Djamena Agreement of 9 November 2004, DAR-OTP-0154-0004 at 0006-0008.

[80] ICC-02/05-02/09-243-Red, paras. 110 and 112, referring to the following evidence also tendered in the present case: (i) evidence as to the mandate of AMIS as an independent monitoring mission, see Communiqué of the Seventeenth Meeting of the Peace and Security Council, DAR-OTP-0154-0500 at 0501,

(iii) there are substantial grounds to believe that AMIS personnel were entitled to the protection afforded to civilians at all the times relevant to the present case;[82] and that

(iv) there are substantial grounds to believe that, at the time of the attack of 29 September 2007, AMIS installations, material, units and vehicles stationed at the MGS Haskanita were entitled to the protection afforded to civilian objects.[83]

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para. 4; (ii) evidence as AMIS' personnel understanding that their mandate was to treat all parties to the conflict on an equal footing and actually did so, see statement of Witness 416, DAR-OTP-0165-0381 at 0393, para. 59; Statement of Witness 420, DAR-OTP-0165-0521 at 0525, para. 18.

[81] ICC-02/05-02/09-243-Red, paras. 113-125, referring to the following evidence also tendered in the present case: (i) evidence as to the initial mandate ascribed to the Ceasefire Commission on 8 April 2004: Humanitarian Ceasefire Agreement, DAR-OTP-0043-0045 at 0050, article 3 and at 0051, article 4; (ii) evidence as to the revised and enhanced mandate of AMIS of 20 October 2004 which did not extend to a peace enforcement or disarmament mandate: *Communiqué of the Sixteenth meeting of the Peace and Security Council*, PSC/PR/Comm. (XVI), DAR-OTP-0154-0059 at 0060, para. 8; *Communiqué of the Seventeenth meeting of the Peace and Security Council* DAR-OTP-0154-0500 at 0501, para. 4 and at 0502, para. 6; (iii) evidence as to the Rules of Engagement as understood and complied with by AMIS personnel: Human Rights Watch, *Imperatives for Immediate Change: the African Union Mission in Sudan*, DAR-OTP-0154-0074, at 0102 and footnote 51 at 0102; Statement of Witness 446, DAR-OTP-0169-0808 at 0811, paras. 13, 15, 16 and at 0819, para. 92 and *viva voce* testimony of Witness 446, DAR-OTP-0180-0070 from 0095, line 9 to 0098, line 2; Statement of Witness 447, DAR-OTP-0169-1160 at 1164, para. 17 and at 1165, para. 22; Statement of Witness 420, DAR-OTP-0165-0521 at 0532, para. 65.

[82] ICC-02/05-02/09-243-Red, para.132, referring to the following evidence also tendered in the present case: (i) evidence as to the understanding of AMIS personnel deployed in MGS Haskanita that AMIS was intended to be impartial and entrusted with an observation mandate: Statement of Witness 420, DAR-OTP-0165-0521 at 0525 paras. 18 and 20; Statement of Witness 446, DAR-OTP-0169-0808 at 0822, para. 130; Statement of Witness 419, DAR-OTP-0165-0489 at 0493-0494, paras. 21-23 see also at 0500, para. 56; Statement of Witness 416, DAR-OTP-0165-0381 at 0385, para. 16; Statement of Witness 447, DAR-OTP-0169-1160 at 1165, para. 22. (ii) evidence as to the fact that the Protection Force was the only AMIS component to be armed in the MGS Haskanita for the purposes of protecting AMIS personnel and that PF personnel were aware of the extent of their mandate: Statement of Witness 419, DAR-OTP-0165-0489 at 0494, para. 23, at 0504, para.78, at 505, paras 78 and 80; Statement of Witness 315, DAR-OTP-0164-1159 at 1163-1164, paras. 16 and 20; Statement of Witness 417, DAR-OTP-0165-0424 at 0427, para. 12; Statement of Witness 447, DAR-OTP-0169-1160 at 1165, para. 22 and at 1172-1173, paras. 79 and 85; Statement of Witness 446, DAR-OTP-0169-0808 at 0811, para. 15 and at 0819, para. 92;.(iii) evidence as to the fact that when faced with hostilities, AMIS personnel of the MGS Haskanita reduced their activities within the area: Statement of Witness 420, DAR-OTP-0165-0521 at 0529, paras. 43-46; Statement of Witness 419, DAR-OTP-0165-0489 at 0503, paras 70-72; (iv) evidence as to the fact that rebels imposed a flight restriction on AMIS helicopters on September 2007: Statement of Witness 417, DAR-OTP-0165-0424 at 0432, para. 34. Statement of Witness 419, DAR-OTP-0165-0489 at 0503, para. 72; Statement of Witness 447, DAR-OTP-0169-1160 at 1170, para. 59; Statement of Witness 417, DAR-OTP-0165-0424 at 0432, para 34.

64. Accordingly, given that the same evidence was presented in the present case, the Chamber is satisfied that there is sufficient evidence to establish substantial grounds to believe that all the objective elements of the offence charged under Count 2 are fulfilled.

3.2 Subjective elements of the crime

65. In accordance with the Elements of Crimes, for the crime under article 8(2)(e)(iii) of the Statute to be established, the subjective elements (specific intent) of the offence must also be present. More specifically, it must be established that (i) the perpetrator intended personnel, installations, material, units or vehicles involved in a peacekeeping mission in

[83] ICC-02/05-02/09-243-Red, para.149, referring to the following evidence also tendered in the present case: (i) evidence as to the rebels' complaints related to the alleged inappropriate activities of a specific GoS Representative, Captain Bashir, in the MGS Haskanita (ICC-02/05-02/09-243-Red, paras.134-140 and 147): Statement of Witness 417, DAR-OTP-0165-0424 at 0430, para. 25, at 0431 para 29 "They also accused Captain Bashir, the Government of Sudan representative who used to stay with us in the compound, of giving the government information about their activities. They demanded that he should leave the camp immediately."; Statement of Witness 416, DAR-OTP-0165-0381 at 0388, para. 33; Statement of Witness 446, DAR-OTP-0169-0808 at 0817, para. 75 and *Viva voce* testimony of Witness 446 in the Abu Garda Case, DAR-OTP-0180-0148 at 0170-0171; Statement of Witness 447, DAR-OTP-0169-1160 at 1167, paras. 36 and 40. Also at 1169, para. 55; Statement of Witness 315, DAR-OTP-0164-1159 at 1175, para. 70. See also photographs of the visit referred to by Witness 315, DAR-OTP-0164-0994 to DAR-OTP-0164-1112; Statement of Witness 355, DAR-OTP-0165-0352 at 0359, para. 40: "These groups warned the MGS Haskanita that if the GoS attack them again, then they would turn their gunpoint to the AMIS in Haskanita."; See also the Statement of Witness 419, DAR-OTP-0165-0489 at 0498, para. 45, at 0499, para. 46 and at 0500, para. 53 and DAR-OTP-0168-0168 at 0171, para. 11; (ii) evidence as to the removal of Captain Bashir well before the attack of 29 September 2007: Statement of Witness 417, DAR-OTP- 0165-0424 at 0431, para. 30: "After the visiting rebels left, we communicated with our superiors and they sent a helicopter the next day to evacuate Captain Bashir to Al Daein"; Statement of Witness 419, DAR-OTP-0165-0489 at 0499-0500, paras. 46 and 53 and DAR-OTP-0168-0168 at 0171, para. 14; Statement of Witness 446, DAR-OTP-0169-0808 at 0817, paras. 69-72; *Viva voce* testimony of Witness 446 in the Abu Garda Case, DAR-OTP-0180-0148 at 0177, lines 3-5 and 9-13; and at 0180, lines 4-6; See photographs DAR-OTP-0164-1024 and DAR-OTP-1690-0865 and *viva voce* testimony of Witness 446 in the Abu Garda Case, DAR-OTP-0180-0070 from 0124, line 1 to 0125, line 6. (iii) evidence suggesting that there was no replacement of Captain Bashir at the MGS Haskanita at the time of the attack (ICC-02/05-02/09-243-Red, paras.143-148): Statement of Witness 419, DAR-OTP-0165-0489 at 0496, paras. 32 and 46; Statement of Witness 420, DAR-OTP-0165-0521 at 0537, para. 94: "GoS representatives were not present in the camp during the attack"; and "The other representative went on official leave long before the attack". The Chamber further underlined in the Abu Garda Decision (paras.144-145) that while Witness 446 mentions in his statement the fact that Captain Bashir was replaced by another GoS (DAR-OTP-0169-0808 at 0817, para. 76) this is not only inconsistent with his *viva voce* testimony (DAR-OTP-0180-0148 at 177-179) but also with the statements of Witnesses 419 and 420.

accordance with the Charter of the UN to be the object of the attack; and that (ii) the perpetrator was aware of the factual circumstances that established the protection given to civilians or civilian objects under the international law of armed conflict.

66. The Chamber recalls the findings made in the Abu Garda Case that AMIS personnel "enjoy protection from attacks unless and for such time as they take a direct part in hostilities or in combat-related activities."[84] Likewise, AMIS installations, material, units or vehicles "shall be entitled to the protection given to civilian objects, unless and for such time as their nature, location, purpose or use make an effective contribution to the military action of a party to a conflict and insofar as their total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[85]

67. Article 8(2)(e)(iii) of the Statute therefore requires the perpetrators' awareness of the factual circumstances that on the day of the attack established the protection both of AMIS personnel and of AMIS installations, material, units and vehicles.

68. To that end, the analysis will start with the statements of the insider witnesses, some of whom reported the alleged orders they received prior to the attack on the MGS Haskanita. For instance, Witness 304 refers to Abdallah Banda as the commander who came and told them that they were going on a mission; the witness states that they were told that "there were government soldiers in Haskanita and that [they] must go there and attack."[86] Witness 433 states that "Saleh Jerbo talked to one of [his] leaders and informed him that they were going to attack Haskanita and he mentioned that, because of the African Union, they were attacked."[87] Witness 312 further states that JEM and SLA Unity commanders ordered them to go on a mission and that he was told that "the reason for the

[84] ICC-02/05-02/09-243-Red, paras 83 and 84.
[85] ICC-02/05-02/09-243-Red, para.89. See also article 52(2) of API which is also applicable, as a customary rule of international humanitarian law, to armed conflict not of an international character.
[86] Summary of interview transcript of Witness 304, DAR-OTP-0171-0258 at 0277, para.138.
[87] Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0441, para. 39.

attack was that this force was collaborating with the government"[88] and that although "the African people were not mentioned [he] understood that it was the African Union people that were being referred to."[89] In the same vein, Witness 314 reports that "the reason given for the attack was that the AU was giving information to the [G]overnment of Sudan about rebel positions."[90]

69. Such statements seem to echo the complaints previously brought to the attention of AMIS by rebel representatives in the month of the attack. This issue was extensively discussed by the Majority in the Abu Garda Decision in light of the same evidence as that presented by the Prosecutor in the present case. The Chamber recalls that the Majority in the Abu Garda Case found that after the fighting that broke out in the Haskanita village on 10 September 2007, in the course of which GoS aircraft bombed the area,[91] members of rebel armed groups, including SLA-Unity, went to the MGS Haskanita and "accused the GoS representative who was present in the MGS Haskanita, of relaying information to the GoS for the purpose of bombing their groups, and threatened that they would attack the MGS Haskanita if the GoS attacked them again."[92] Some indirect evidence further suggested that "Captain Bashir [the GoS representative stationed at the MGS Haskanita] was using the Thuraya phone in the AMIS communication room within the MGS Haskanita to relay the coordinates of the position of the armed rebel groups to the GoS."[93]

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[88] Summary of interview transcript of Witness 312, DAR-OTP-0171-0335 at 0349, para. 82.

[89] Ibid., at 343, para 45.

[90] Revised Summary of interview transcript of Witness 314, DAR-OTP-0171-0370 at 0392, para. 168. See also at 0381, paras. 85 and 87 and at 0386, para.124.

[91] ICC-02/05-02/09-243-Red, para. 137. Statement of Witness 417, DAR-OTP-0165-0424 at 0430, para. 25.

[92] ICC-02/05-02/09-243-Red, para.138, referring to the statement of Witness 416, DAR-OTP-0165-0381 at 0388, para. 33; Statement of Witness 417, DAR-OTP-0165-0424 at 0431, para. 29; Statement of Witness 446, DAR-OTP-0169-0808 at 0817, para. 75; Statement of Witness 447, DAR-OTP-0169-1160 at 1167, paras. 36 and 40. Also at 1169, para. 55; Statement of Witness 315, DAR-OTP-0164-1159 at 1175, para. 70. See also photographs of the visit referred to by Witness 315, DAR-OTP-0164-0994 to DAR-OTP-0164-1112. Statement of Witness 419, DAR-OTP-0165-0489 at 0498-0499, para. 45. *Viva voce* testimony of Witness 446, DAR-OTP-0180-0148. Statement of Witness 355, DAR-OTP-0165-0352 at 0359, para. 40.

[93] ICC-02/05-02/09-243-Red, para.147, relying on Statement of Witness 446, DAR-OTP-0169-0808 at 0813, para. 31; Statement of Witness 419, DAR-OTP-0168-0168 at 0171, paras. 10-12.

However, based on the same evidence as that currently before the Chamber, the Majority found in the Abu Garda Case that:

> "regardless of the veracity and duration of the alleged inappropriate activities performed by Captain Bashir during his stay at the MGS Haskanita, he was removed from the compound well before the attack which is the subject of the charges in the present case, and that his departure was witnessed by some members of the armed rebel groups. The alleged inappropriate activities of Captain Bashir cannot therefore be considered as having had an impact on the protected status of AMIS installations, material, units or vehicles at the MGS Haskanita at the time of the 29 September 2007 attack"[94] and that,
>
> "even if it were to be accepted that Captain Bashir relayed information to the GoS, the evidence in any event shows that he was removed well before the attack of 29 September 2007 and that there is nothing concrete to suggest that after his removal information continued to be relayed to the GoS."[95]

70. The Chamber notes in this connection that the abovementioned complaints only concerned the alleged inappropriate activities of a specific GoS representative present in the AMIS compound. It is significant to note that no other complaints were reported and that, in particular, at no point it was claimed that AMIS personnel or any other person present at the MGS participated directly in hostilities. The Chamber thus finds that the allegations of inappropriate use of the MGS' facilities, whilst potentially of relevance to the protected status of AMIS installations, material, units and vehicles, cannot be advanced by the perpetrators, including Abdallah Banda and Saleh Jerbo, as a ground *per se* to deny their awareness of the factual circumstances establishing the protection enjoyed by AMIS personnel. For these reasons, the Chamber will discuss these two aspects separately, starting with the awareness of the protected status of AMIS personnel.

71. The Chamber is of the view that, consistent with paragraph 3 of the General introduction to the Elements of Crimes, the awareness of Abdallah Banda, Saleh Jerbo and the other attackers of the factual circumstances that established the AMIS personnel's protection at the time of the 29 September 2007 attack on the MGS Haskanita can be inferred from relevant facts and circumstances.

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[94] ICC-02/05-02/09-243-Red, para. 142.
[95] Ibid., para. 147.

72. The Chamber recalls that in June 2004 AMIS began its deployment as a peacekeeping mission, whose mandate essentially involved monitoring the implementation of the Humanitarian Ceasefire Agreement of 8 April 2004. AMIS personnel deployed in the MGS Haskanita repeatedly explained the scope and limits of their mandate to the local villagers[96] and any rebel armed groups which were in the area,[97] including SLA-Unity and JEM, some of whose members later joined the JEM-Splinter Group that took part in the attack on the MGS Haskanita on the 29 September 2007.

73. When armed rebel groups took control of Haskanita village and threatened the AMIS personnel,[98] the personnel did not respond to the threats with the use of force. Instead, the MGS Haskanita Commander decided to reduce AMIS activities in the area.[99] AMIS activities were monitored by the rebels, who initially imposed flight restrictions on AMIS helicopters before a compromise was reached by which AMIS "would inform them in advance of the arrival of [their] helicopters. Then the rebels used to come to the landing strip to monitor what was being offloaded from the helicopters".[100] This amply demonstrates that in addition to evincing no intention to engage in hostilities, the AMIS personnel promptly accommodated the wishes of the rebels in order to avoid any type of conflict with them.

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[96] Statement of Witness 420, DAR-OTP-0165-0521 at 0530, para. 49 : "During our daily patrols (except Friday), we told the population that we were there to ensure the adherence of the ceasefire." Statement of Witness 419, DAR-OTP-0165-0489 at 00497, para. 38: "We stated that we were only an observation force, and we could not promise that the aerial attacks will stop."

[97] Statement of Witness 419, DAR-OTP-0165-0489 at 0498, para. 43 and at 0500, para. 56: "I explained to them that by our mandate all we were to do was to report these bombing incidents to our superiors. MGS Haskanita could only pass the information to our superiors, and we could not do anything actively to stop the bombing [...] we are neutral. You have to accept it." Statement of Witness 420, DAR-OTP-016-0521 at 0528, para. 37 and at 0529, para.45.

[98] *See* supra para. 69.

[99] ICC-02/05-02/09-243-Red, para.131 supported by the following evidence: Statement of Witness 420, DAR-OTP-0165-0521 at 0529, paras. 43-46. Statement of Witness 419, DAR-OTP-0165-0489 at 0503, paras. 70-72.

[100] ICC-02/05-02/09-243-Red, para.131 supported by the following evidence Statement of Witness 417, DAR-OTP-0165-0424 at 0432, para. 34; Statement of Witness 419, DAR-OTP-0165-0489 at 0503, para. 72; Statement of Witness 447, DAR-OTP-0169-1160 at 1170, para. 59; Statement of Witness 417, DAR-OTP-0165-0424 at 0432, para. 34.

74. In addition, the Chamber notes that AMIS personnel always expressed their readiness to ascertain the nature of the rebels' grievances by holding meetings with them, at which the limited and neutral mandate of AMIS was restated. For example, witness 447 states that, on 14 September 2007, "some rebels came to the camp and alleged that [we] were hiding GoS soldiers. [We] denied and even offered them to search [our] camp."[101] Whilst the witness cannot remember which individuals were on the rebels' side, he nonetheless underscores that "most of their vehicles were written JEM."[102]

75. The evidence further gives the Chamber substantial grounds to believe that AMIS personnel did not take direct part in hostilities before or during the attack. Indeed, as demonstrated by the statements of both AMIS personnel and members of the rebel groups, some of whom took part in the attack, the use of force by some AMIS personnel during the attack of 29 September 2007 was in response to the attack launched by the rebels, and thus in self-defence.[103] This is clearly evidenced by Witness 446's statement where he underlines that before firing, they tried "to figure out what was happening" as they did not want to mistake clashes "between rebels and GoS as an attack on [their] camp."[104] In addition, AMIS personnel responded with the use of force in self-defence after giving prior warning to the attackers by firing flares into the air.[105]

76. For these reasons, the Chamber is satisfied that there are substantial grounds to believe that the perpetrators, including Abdallah Banda and Saleh Jerbo, were aware of the protected status of the AMIS personnel deployed in the MGS Haskanita, as the

[101] Statement of Witness 433, DAR-OTP-0170-0435 at 0446, para. 65.
[102] Ibid.
[103] Statement of Witness 446, DAR-OTP-0169-0808 at 0819, para. 92; Statement of Witness 304, DAR-OTP-0171-0258 at 0278, para. 148: "We arrived at the base and they immediately started firing at the base when they were fired at they fired back."
[104] Statement of Witness 446, DAR-OTP-0169-0808 at 0819, para. 92.
[105] Summary of interview transcript of Witness 307, DAR-OTP-0171-0308 at 0313, para. 40 :"Salih Jerbo opened fire on AU forces. The AU responded but they were shooting in the air [...] It continued to shoot in the air with red-and green- coloured fire, which you could see in the darkness of the night."

perpetrators knew that AMIS personnel were not taking direct part in hostilities and that they only resorted to force in self-defence during the 29 September 2007 attack.

77. Turning now to the issue of the awareness of the protected status of AMIS installations, material, units and vehicles at the time of the attack on 29 September 2007, the Chamber notes that two scenarios can be envisaged when assessing whether the perpetrators were aware of the factual circumstances that established such protection:

(i) the perpetrators were aware that Captain Bashir was removed; or

(ii) the perpetrators were either not aware of the removal of Captain Bashir or believed that despite his removal, information was still relayed to the GoS from the MGS Haskanita.

78. The Chamber notes that scant evidence was presented that could unequivocally support one of these two scenarios and exclude the other. The Chamber will thus examine them in turn.

79. As regards the first scenario, the Chamber recalls that the complaints made by members of rebel armed groups, including SLA-Unity, only concerned the alleged misuse of AMIS facilities by a specific representative of the GoS. No other issue was raised in their complaints that might call into question the protected status of the MGS Haskanita's installations, material, units and vehicles. It follows that if it is accepted that the perpetrators were aware of the removal of the said GoS representative, Captain Bashir, then they had no other reason, following his removal, to believe on the day of the attack that any of the AMIS facilities were used to contribute effectively to military action. For these reasons, the Chamber finds that there are substantial grounds to believe that if the first scenario is accepted as proven to the required threshold, then the perpetrators were aware that the abovementioned facilities, located in the MGS Haskanita, made no effective contribution to military action at the time of the attack and were therefore protected.

80. The second scenario would be confirmed by the alleged information and orders which, as reported by insider witnesses, were given to the troops by the commanders prior to the attack on the MGS Haskanita.[106] However, the manner in which the attack on MGS Haskanita was executed suggests otherwise.

81. It clearly emerges from the witness statements of AMIS personnel[107] that as soon as the attack began, the attackers first hit and destroyed the telecommunication centre and the combat post. According to witness 420, "[i]f there was no resistance from there then [the attackers] could gain easy entry."[108] The evidence demonstrates that the attackers did not stop their attack when they disabled the telecommunication facilities, but that they entered the MGS Haskanita and overpowered AMIS personnel.[109]

82. Furthermore, there is no evidence to suggest that the attackers attempted to locate the GoS representative at any moment during the attack. On the contrary Witness 446 mentions that he saw one group of rebels who "were shouting 'where is the OC'" (the AMIS Officer Commander) whilst other witnesses consistently recount that as soon as they entered the compound, the attackers started pillaging. Witness 417 for instance states that "[a]fter they entered the camp, the first thing they did was to grab our vehicles."[110] Witness

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[106] See above para. 68.

[107] Statement of Witness 420, DAR-OTP-0165-0521 at 0531 para. 53: "A few minutes form the beginning of the attack, the generator went off and it became dark in the Camp. In my opinion, it was an advantage for the attackers that the generator went off. In the first place, the attackers hit the communication centre (...) in which the PF was killed, and the northern guard post (in which another PF was killed. After killing the PF in the northern guard post, there was almost nobody left to stop the attackers" and at 0534, para.78: "The combat post (...) and the communication centre (...) where the first structures fired upon in the attack. It was the natural thing to do first. The attackers were combatants and they knew the importance of the communication room and the combat post (...)." Statement of Witness 419, DAR-OTP-0165-0489 at 0504 paras. 74 to 77: "At about 19:15hrs the attackers arrived from the north side, from the direction of the Haskanita village (...) In the beginning of the attack, the guards at the northern entrance of the gates (...) were shot and killed (...)" See also Statement of Witness 315, DAR-OTP-0164-1159 at 1171 para.46

[108] Statement of Witness 420, DAR-OTP-0165-0521 at 0534 para.78.

[109] Statement of Witness 419, DAR-OTP-0165-0489 at 0506, para. 86: "One hour after the attackers entered the Camp, the PFs were no longer returning fire. They each had only one magazine of thirty rounds in their weapons. This was totally insufficient to enable them put up an effective and sustained defence"

[110] Statement of Witness 417, DAR-OTP-0165-0424 at 0433, para. 42.

419 adds that some of the attackers where saying "Money! Money! Money!"[111] It is also important to note that other witnesses mention the fact that, during the attack, local staff collaborated with the attackers by leading them to the armoury to obtain the weapons,[112] to the tent of a Military Observer,[113] "to the PAE office inside the camp knowing that it had a safe with money in it,"[114] in addition to assisting them to start vehicles.[115]

83. In addition, witness 433 states that the illegality of attacking the African Union was also a subject of discussion and argument between Saleh Jerbo and the leaders of one rebel group which, for that reason, refused to participate in the attack.[116] In his statement, witness 314 expressed the belief that the attack was aimed at re-supplying the troops with ammunition, fuel and foodstuffs.[117]

84. Some insider witnesses challenged or disbelieved the orders they received from their commanders. For instance, witness 305 reports questioning one of the commanders on the reasons for attacking AMIS rather than government forces, since "[their] problem was with the government and [they] had no business attacking the African Union"; he also relates that the commander "was not pleased with [his] question."[118] Witness 312 states

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[111] Statement of Witness 419, DAR-OTP-0165-0489 at 0506, para.89.

[112] Statement of Witness 446, DAR-OTP-0169-0808 at 0821, para. 120.

[113] Statement of Witness 315, DAR-OTP-0164-1159 at 1171, para. 51; Statement of Witness 417, DAR-OTP-0165-0424 at 0434, para.47. The Chamber recalls that the Military Observers deployed in the AMIS MGS were not armed and that their protection was provided by the Protection Force, which was the only armed force present at the sites, see ICC-02/05-02/09-243-Red, para.101 which refers to the Modalities Agreement, DAR-OTP-0021-0261 at 0269 as well as the statement of Witness 446, DAR-OTP-0169-0808 at 0811, para. 15, the statement of Witness 419, DAR-OTP-0165-0489 at 0504, para. 78 and the statement of Witness 417, DAR-OTP-0165-0424 at 0427, para. 12.

[114] Statement of Witness 315, DAR-OTP-0164-1159 at 1172, para. 54. The PAE is a company that provided logistic support to peacekeeping operations, see the DCC, para.73.

[115] Statement of Witness 446, DAR-OTP-0169-0808 at 0822, para. 122; Statement of Witness 447, DAR-OTP-0169-1160 at 1173, para.92.

[116] Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0441, para. 39; at 0444, paras. 57-58; at 0447, para. 74 and at 0454, para. 111.

[117] Summary of interview transcript of Witness 314, DAR-OTP-0171-0370 at 0394, para.182: "The objective of the attack might have been to get enough supplies, fuel and transportation in order to leave the area because afterwards, this is what happened. We managed to travel up to Adola."

[118] Revised Summary of Transcript of Interview of Witness 305, DAR-OTP-0171-0290 at 0294, para.36.

that he "didn't believe [Jerbo] because [he] knew that the government was not in Haskanita"[119] and adds that they were "deliberately" not being told that "those people" that they were asked to attack were African Union personnel.[120]

85. Accordingly, the Chamber is of the view that the evidence regarding the manner in which the attack was launched coupled with the statements of some insider witnesses is sufficient to establish substantial grounds to believe that when attacking MGS Haskanita with the personnel, installations, material, units and vehicles deployed therein, the perpetrators, including Abdallah Banda and Saleh Jerbo, did not intend to target any military objective, but appear to have been driven by other motives such as the pillaging of goods that the rebels were lacking, notably vehicles, fuel, weapons or communication equipment.

86. In light of the above, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that not only did the perpetrators, including Abdallah Banda and Saleh Jerbo, intend the AMIS personnel, installations, material, units and vehicles stationed in Haskanita to be the target of their attack on 29 September 2007, but they were also aware of the factual circumstances that established their protection at all times relevant to the attack on 29 September 2007.

87. On the basis of the above, the Chamber is satisfied that there is sufficient evidence to establish substantial grounds to believe that the crime charged under Count 2 was committed.

4. Count 1: Violence to life

88. In Count 1, pursuant to article 8(2)(c)(i) of the Statute, the Prosecutor charges Abdallah Banda and Saleh Jerbo as follows:

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[119] Revised Summary of Transcript of Interview of Witness 312, DAR-OTP-0171-0335 at 030343, para.45.
[120] Ibid. at 0343, para.46.

> On 29 September 2007, at the MGS Haskanita in Haskanita Village, Um Kadada Locality in North Darfur, the Sudan, in the context of and associated with an internal armed conflict, **BANDA and JERBO** together with JEM Splinter Group, SLA Unity and SLA Abdul Shafie forces under their command and control, acting pursuant to a common plan and orders issued by them, jointly with their forces, attacked the MGS Haskanita and killed twelve (12) AMIS peacekeeping personnel and attempted to kill eight (8) AMIS peacekeeping personnel, with the knowledge that they were (1) personnel involved in a peacekeeping mission established in accordance with the UN Charter; and (2) taking no active part in hostilities and thus entitled to the protection given to civilians under the international law of armed conflict, thereby committing a crime in violation of Articles 8(2)(c)(i) and 25(3)(a) and 25(3)(f) of the Rome Statute.[121]

4.1 Objective elements of the crime

89. According to the Elements of Crimes, the following objective elements are required in order to constitute the crime provided for in article 8(2)(c)(i)-1 of the Statute: (i) the perpetrator killed one or more persons; and (ii) such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.

90. The DCC alleges that, during the attack on the MGS Haskanita, ten AMIS peacekeepers were shot and killed, whilst two more peacekeepers died later as a consequence of injuries sustained during the attack. The peacekeepers who were killed were: Major [Gaolatlhe] Tiro (Botswana), Bala Mohammed (Nigeria), Martin Matthias (Nigeria), Haruna Peter (Nigeria), Duniya Audu (Nigeria), Samuel Orokpo (Nigeria), John Dogara (Nigeria), Tayo Alawo (Nigeria), Usman Saleh (Nigeria), Danjuma Madaki (Nigeria), Mayoro Kebe (Senegal) and Ibrahim Diagne (Mali).[122]

91. The DCC also alleges that "[a]s a result of the attack, about eight AU personnel [REDACTED] sustained severe injuries" and "survived the attack only as a result of assistance they received after the departure of the JEM Splinter Group and SLA Unity

[121] ICC-02/05-03/09-79-Red, p. 43.
[122] ICC-02/05-03/09-79-Red, para. 101.

forces".[123] In the view of the Prosecutor, the injuries sustained by those victims were so severe that the conduct that occasioned them qualifies as attempted murder. Accordingly, in relation to these injuries, the Prosecutor charges the suspects with attempted murder pursuant to articles 8(2)(c)(i) and 25(3)(f) of the Statute.

92. The fact that some AMIS personnel were killed during the attack and the number and identities of those killed can be considered to be one of the facts agreed upon by the Prosecutor and the Defence. Moreover, the Chamber wishes to emphasise that those deaths were also widely reported not only by the AU,[124] but also by intergovernmental organisations[125] and the world press,[126] as shown by the evidence presented by the Prosecutor in both the Abu Garda and the present case. Furthermore, a number of witness statements contain several specific references to the victims, their number[127] and identities,[128] as well as details of the circumstances in which some of them were either killed or wounded by the attackers.[129]

93. Accordingly, the Chamber is satisfied that there are substantial grounds to believe that Gaolatlhinee Tiro, Bala Mohammed, Martin Matthias, Haruna Peter, Duniya Audu, Samuel Orokpo, John Dogara, Tayo Alawo, Usman Saleh, Danjuma Madaki, Mayoro Kebe

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[123] ICC-02/05-032/09-79-Red, para. 102.

[124] African Union Press Statement, 2 October 2007, DAR-OTP-0158-0011; African Union Press Statement, 30 September 2007, DAR-OTP-0158-0010.

[125] UNAMID News Bulletin, May 2008, Issue 15, DAR-OTP-0152-230 at 0231, listing the 10 peacekeepers who died during the attack. UN Security Council, 8 October 2007, report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur, DAR-OTP-0157-1318 at 1322, para. 19.

[126] ABC News, 1 October 2007, DAR-OTP-0154-0352; All Africa, the Darfur Crisis, BDF's Major Tiro dies on Darfur Mission, 9 October 2007, DAR-OTP-0154-0339, paras. 1-2 and 7; Reuters, "Darfur attack kills 10 AU troops, dozens missing", 30 September 2007, DAR-OTP-0154-0366; CNN.com, "Rebels storm peacekeeping base in Darfur killing 12 soldiers, DAR-OTP-0158-0004.

[127] Statement of Witness 326, DAR-OTP-0166-0021 at 0025, para. 32.

[128] Statement of Witness 355, DAR-OTP-0165-0352 at 0362, paras. 63-64.

[129] Statement of Witness 355, DAR-OTP-0165-0352 at 0362 para. 64. Statement of Witness 419, DAR-OTP-0165-0489 at 0504 75-76 and at 0507-0509, paras. 96, 101-105. Statement of Witness 446, DAR-OTP-0169-0808 at 0824, paras. 141-142; 145; see also at DAR-OTP-0169-0825, para. 148. Statement of Witness 315, DAR-OTP-0164-1159 at 1173, para. 58.

and Ibrahim Diagne were either killed during the attack on the MGS Haskanita or died in its immediate aftermath, due to the seriousness of the injuries suffered during the attack.

94. The fact that some AMIS personnel sustained severe injuries is also to be considered as one of the facts agreed upon by the Prosecutor and the Defence. The injuries suffered by those persons were likewise widely reported by the AU,[130] other intergovernmental organisations[131] and the world press.[132] The circumstances in which some of these individuals were injured were also referred to by a number of witnesses in their statements.[133] Some witnesses were themselves wounded at MGS Haskanita.[134]

95. On the basis of the evidence, the Chamber is satisfied that there are substantial grounds to believe that the relevant eight AMIS personnel in question did indeed sustain serious injuries during and in the context of the attack. For the Chamber to be satisfied that those injuries constitute the crime of attempted murder, it must determine that there are substantial grounds to believe that those injuries qualify as such under articles 8(2)(c)(i) and 25(3)(f). The Chamber notes that article 25 sets out various modes of individual criminal responsibility. However, the Chamber recalls the ruling made in the *Katanga* case that "the attempt to commit a crime is a crime."[135] The Chamber will thus examine the

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[130] African Union Press Statement, 2 October 2007, DAR-OTP-0158-0011; African Union Press Statement, 30 September 2007, DAR-OTP-0158-0010.

[131] UNAMID News Bulletin, May 2008, Issue 15, DAR-OTP-0152-0231, listing the 10 peacekeepers who died during the attack. UN Security Council, 8 October 2007, report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur, DAR-OTP-0157-1322, para. 19.

[132] ABC News, 1 October 2007, DAR-OTP-0154-0352; All Africa, the Darfur Crisis, BDF's Major Tiro dies on Darfur Mission, 9 October 2007, DAR-OTP-0154-0339, paras. 1-2 and 7; Reuters, "Darfur attack kills 10 AU troops, dozens missing", 30 September 2007, DAR-OTP-0154-0366; CNN.com, "Rebels storm peacekeeping base in Darfur killing 12 soldiers", DAR-OTP-0158-0004.

[133] Statement of Witness 355, DAR-OTP-0165-0352 at 0362, para. 64. Statement of Witness 419, DAR-OTP-0165-0489 at 0509, paras. 102-105. Statement of Witness 446, DAR-OTP-0169-0808 at 0824, paras. 141-142 and 145; see also at 0825, para. 148. Statement of Witness 419, DAR-OTP-0165-0489 at 0504, paras. 75-76; see also at 0507-0509, paras. 96, 101-103, 105. Statement of Witness 315, DAR-OTP-0164-1159 at 1173, para. 58.

[134] Statement of Witness 446, DAR-OTP-0169-0808 at 0825, para. 148; see also at0820, paras. 104-105. Statement of Witness 416, DAR-OTP-0165-0381 at 0391, para. 44.

[135] ICC-01/04-01/07-717, para. 460.

allegations made under article 25(3)(f) of the Statute in the context of crimes charged under Count 1.

96. The first sentence of article 25(3)(f) of the Statute provides that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person "attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions". It is therefore of critical importance, in considering whether a crime can be characterised as attempted (or "inchoate") to determine whether the perpetrator's conduct was adequate to bring about as a consequence the crime in question. Such adequacy requires that, in the ordinary course of events, the perpetrator's conduct will have resulted in the crime being completed, had circumstances outside the perpetrator's control not intervened.

97. The attempted commission of a crime requires that the perpetrator's conduct reaches a more definite and concrete stage going beyond mere preparatory acts. This is apparent from the drafters' choice of the term "substantial step" as a fundamental requirement for an attempt to occur as provided for in article 25(3)(f) of the Statute.

98. The Chamber takes the view that the nature of the attackers' conduct in the context of the attack on the MGS Haskanita was indeed such as to make the injuries caused to the eight (8) AMIS personnel qualify as attempted murders within the meaning of articles 8(2)(c)(i) and 25(3)(f) of the Statute. Those injuries were caused by the very same conduct[s] which caused the death of the other twelve peacekeepers mentioned above.[136]

99. The Chamber takes note of the Prosecutor's allegations that the eight AMIS personnel were able to survive because they were promptly assisted "after the departure of the JEM Splinter Group and SLA Unity forces". As a factual statement included in the DCC, the statement falls within the scope of the agreement between the Prosecutor and the

[136] See supra para. 64.

Defence and, accordingly, the Chamber has the discretion to consider it as proven for the purposes of confirmation. It notes that, by any standard, the provision of medical assistance to the wounded by a person other than the one responsible for causing the injuries qualifies as a circumstance outside the perpetrator's control.

100. On the basis of the above reasoning, the Chamber is also satisfied that there are substantial grounds to believe that [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED] sustained injuries during the attack which were so severe as to qualify the conduct causing such injuries as "attempted murder" within the meaning of articles 8(2)(c)(i) and 25(3)(f) of the Statute.

101. In relation to the second objective requirement of the crime of violence to life in the form of murder pursuant to article 8(2)(c)(i) (whether committed or attempted), it is necessary to establish that at the time of the commission of the crime the victims were taking no active part in the hostilities.

102. In the Abu Garda Decision, the Chamber noted that under the Statute personnel involved in peacekeeping missions enjoy protection from attack unless and for such time as they take a direct part in hostilities or in combat-related activities. It also concluded that the protection does not cease if such persons only use armed force in exercise of their right to self-defence and that any determination as to whether a person is directly participating in hostilities must be carried out on a case-by-case basis.[137] The Chamber reiterates these findings for the purposes of this decision.

103. The Chamber recalls its findings made earlier in the present Decision that there are substantial grounds to believe that AMIS was a peacekeeping mission established in accordance with the Charter of the United Nations, that it was impartial and its personnel was not allowed to use force except in self-defence and that AMIS personnel was entitled

[137] ICC-02/05-02/09-243-Red, para. 83.

to the protection afforded to civilians at all the times relevant to the present case.[138] Furthermore, the Chamber recalls its previous findings that there is no evidence suggesting that prior to the attack or at the time of the attack AMIS personnel took any direct part in hostilities or used force beyond self-defence.[139] On the contrary, the evidence adduced in the present case gives the Chamber substantial grounds to believe that, when faced with hostilities from different rebel groups present in the area, AMIS personnel reduced their activities and promptly accommodated the wishes of the rebels, in order to avoid any type of conflict with them.[140]

104. On this basis, the Chamber is satisfied that there are substantial grounds to believe that the individuals who were murdered and severely injured (amounting to attempted murders) within the context of the attack on the MGS Haskanita, enjoyed the protection afforded to persons taking no active part in hostilities, within the meaning of article 8(2)(c)(i) of the Statute.

4.2 *Subjective element of the crime*

105. For the crime under article 8(2)(c)(i) of the Statute to be established, the perpetrator must have been aware of the factual circumstances that established the victims' status as persons taking no active part in the hostilities.

106. As regards the subjective element of the attempted murders, as this Chamber has previously stated elsewhere, "the attempt to commit a crime is a crime in which the objective elements are incomplete, while the subjective elements are complete".[141] Therefore, no distinction will be made in the assessment of the subjective elements in relation to murders, whether attempted or completed.

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[138] *See* supra para. 63.
[139] *See* supra 75.
[140] *See* supra 73.
[141] ICC-01/04-01/07-717, para. 460.

107. The Chamber recalls the reasoning developed and the evidence quoted in the present decision, namely that (i) the AMIS was generally perceived as a neutral and impartial; (ii) there were no reports of its personnel perpetrating any attacks; (iii) the MGS Haskanita bore clear markings and had distinct features; (iv) AMIS personnel stationed at the MGS Haskanita wore special and unique uniforms bearing the AMIS logo, which clearly made them stand out *vis-à-vis* members of any of the parties to the conflict.[142] It also recalls the statements reportedly issued by Saleh Jerbo before the attack, indicating awareness on the part of the suspects that the object of the planned attack was the AMIS compound and their intent that the compound would be the target of such attack.[143] The Chamber is thus satisfied that there is sufficient evidence to establish substantial grounds to believe that the attackers, including Abdallah Banda and Saleh Jerbo, were aware of the factual circumstances that established that the persons murdered and severely injured (amounting to attempted murder) enjoyed the status afforded to persons taking no active part in the hostilities.

108. On the basis of the above, the Chamber is satisfied that there are substantial grounds to believe that the subjective element (specific intent) of the crime under article 8(2)(c)(i)-1 of the Statute is fulfilled.

109. On the basis of the above, the Chamber is satisfied that there is sufficient evidence to establish substantial grounds to believe that the crime charged under Count 1 was committed.

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[142] Revised Summary of interview transcript of Witness 312, DAR-OTP-0171- 0335, at 0361, para. 152; Summary of interview transcript of Witness 433, DAR-OTP-0170-0435, at 0458, para. 131.
[143] *See* supra 86.

5. Count 3: Pillaging

110. In Count 3, pursuant to article 8(2)(e)(v) of the Statute, the Prosecutor charges Abdallah Banda and Saleh Jerbo as follows:

> On 29 September 2007, at the MGS Haskanita in Haskanita Village, Um Kadada Locality in North Darfur, the Sudan, in the context of and associated with an internal armed conflict, BANDA and JERBO together with JEM Splinter Group, SLA Unity and SLA Abdul Shafie forces under their command and control, acting pursuant to a common plan and orders issued by them, jointly with their forces, attacked the MGS Haskanita and appropriated property belonging to AMIS and its personnel including vehicles, refrigerators, computers, cellular phones, military boots and uniforms, fuel, ammunition and money, without the consent of the owners and for their private and personal use, thereby committing a crime in violation of Articles 8(2)(e)(f) and 25(3)(a) of the Rome Statute.[144]

5.1 Objective elements of the crime

111. According to the Elements of Crimes, for a conduct to constitute the crime provided for under article 8(2)(e)(v) of the Statute, the following objective elements are required: (i) the perpetrator appropriated certain property; and (ii) the appropriation was without the consent of the owner.

112. More specifically, the DCC alleges that, during the attack on the AMIS compound, Abdallah Banda, Saleh Jerbo and the other commanders and troops of the JEM Splinter Group and SLA-Unity forces under their command and control "engaged in large-scale looting of the MGS Haskanita", appropriating property belonging to the AMIS as well as the personal property of AMIS personnel or of other individuals working at the MGS Haskanita. The appropriated items included "about 17 vehicles belonging to AMIS, ammunitions and weapons from the armoury, large quantities of fuel, food, refrigerators, laptops, cell phones, Thuraya satellite phones, video cameras, uniforms, jewellery,

[144] ICC-02/05-03/09-79-Red, p. 44.

mattresses, suitcases, tents and money". None of the appropriated items was returned to the legitimate owners.[145]

113. The evidence presented by the Prosecutor provides sufficient support for the allegations that a significant amount of property was indeed appropriated by the attackers in the MGS Haskanita. Some witnesses recall the troops having a shortage of fuel, equipment and food in the period immediately preceding the attack.[146] One witness relates having been told that the reason for attacking the African Union in Haskanita was to "get some cars".[147] Most witnesses state that looting of major proportions took place in the context of the attack.[148] Witnesses also specifically affirm having seen Abdallah Banda[149] and Saleh Jerbo[150] and their troops either taking property during the attack,[151] or distributing[152] and selling,[153] or otherwise benefiting[154] from items belonging to the AMIS in the aftermath of the attack.

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[145] ICC-02/05-03/09-79-Red, para. 85, Ibid, paras. 111-113.

[146] Revised summary of transcript of interview of Witness 304, DAR-OTP-0171-0258 at 0270, para. 92. Witness 305 acknowledged that the groups suffered from "a shortage of food and fuel" and that "during the attack or the AU compound, we got a lot of fuel" (Revised summary of transcript of interview of Witness DAR-305, DAR-OTP-0171-0290 at 0295, para. 41).

[147] Transcript of interview of Witness 442, DAR-OTP-0172-0252 at 0262, lines 381-398.

[148] Revised summary of transcript of interview of Witness 305, DAR-OTP-0171-0290 at 0294, paras. 32, 35. Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0453, para. 106. Revised summary of interview transcript of Witness 312, DAR-OTP-0171-0335 at 0358, paras. 134-135. Summary of interview of Witness 441, DAR-OTP-0179-0105 at 0113, para. 40. Revised summary of transcript of interview of Witness 314, DAR-OTP-0171-0370 at 0384, para. 108, and at 0385, para. 116. Summary of Witness Statement of Witness 466, DAR-OTP-0179-0158 at 0162, paras. 16-17. Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308 at 0314, paras. 46-47.

[149] Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0443, para. 54.

[150] Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308 at 0322, para. 107. Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0443, para. 53..

[151] Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308 at 0313, para. 44.

[152] Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0443, para. 52.

[153] Revised summary of interview transcript of Witness 312, DAR-OTP-0171-0335-0352, paras. 98-100, and at 0358, para. 133. Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0457, paras. 125-126.

[154] Revised summary of interview transcript of Witness 312, DAR-OTP-0171-0335 at 0353, para. 102.

114. The witnesses' statements almost unfailingly mention vehicles[155] and uniforms[156] as forming part of the appropriated property. Some degree of consistency also exists in the witnesses' statements regarding the fact that other types of items were also looted from the MGS Haskanita. One of the witnesses refers to one of the commanders using a Thuraya phone and somebody saying that it was "from the AU".[157] Other witnesses mention weapons,[158] fuel,[159] refrigerators,[160] laptop computers,[161] cellular phones,[162] a digital camera,[163] food,[164] civilian clothing,[165] mattresses[166] and cash[167] as also forming part of the loot.

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[155] Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308 at 0313, para. 44. Revised summary of transcript of interview of Witness 304, DAR-OTP-0171-0258 at 0275, para. 122. Summary of interview of Witness 441, DAR-OTP-0179-0105 at 0112, para. 35. Revised summary of interview transcript of Witness 306, DAR-OTP-0171-0298 at 0302, para. 30.

[156] Summary of Witness Statement of Witness 466, DAR-OTP-0179-0158 at 0165, para. 23, and at 0165, para. 26. See also Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308 at 0314, para. 47, who refers to uniforms as being part of the loot. Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0443, para. 52. Transcript of interview of Witness 442, DAR-OTP-0172-0345 at 0358, lines 424 ff.

[157] Summary of Witness Statement of Witness 466, DAR-OTP-0179-0158 at 0166, para. 28.

[158] Revised summary of transcript of interview of Witness 305, DAR-OTP-0171-0290 at 0294, para. 35. Revised summary of interview transcript of Witness 312, DAR-OTP-0171-0335 at 0358, para. 135.

[159] Revised summary of transcript of interview of Witness 305, DAR-OTP-0171-0290 at 0295, para. 41. Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308 at 0314, para. 46, and at 0321, para. 97. Revised summary of transcript of interview of Witness 304, DAR-OTP-0171-0258 at 0275, para. 122, and at 0279, para. 153.

[160] Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308 at 0313, para. 44.

[161] Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308 at 0313, para. 44. Revised summary of interview transcript of Witness 312, DAR-OTP-0171-0335 at 0358, para. 135. Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0443, para. 52.

[162] Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308 at 0313, para. 44. Revised summary of interview transcript of Witness 312, DAR-OTP-0171-0335 at 0358, para. 135. Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0443, para. 52.

[163] Summary of interview of Witness 441, DAR-OTP-0179-0105 at 0114, para. 40.

[164] Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308 at 0324, para. 119. Revised summary of interview transcript of Witness 312, DAR-OTP-0171-0335 at 0343, para. 50, and at 0358, para. 135. Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0453, para. 104. Revised summary of transcript of interview of Witness 314, DAR-OTP-0171-0370 at 0385, para. 116. Transcript of interview of Witness 442, DAR-OTP-0172-0345 at 0355, lines 322 ff.

[165] Summary of interview of Witness 441, DAR-OTP-0179-0105 at 0114, para. 40.

[166] Summary of interview of Witness 441, DAR-OTP-0179-0105 at 0114, para. 43.

115. The evidence offers several elements in support of the fact that items were not only appropriated in the context of the attack, but were kept by the attackers for their personal use. The witnesses, in their statements, are consistent in saying that they saw Abdallah Banda, Saleh Jerbo and their people either taking vehicles during the attack,[168] or riding AMIS vehicles[169] and wearing AMIS uniforms[170] during the days and weeks that followed. Other witnesses state that they realised that the MGS Haskanita had been attacked by Abdallah Banda, Saleh Jerbo and their people, because they saw them after the attack[171] "riding looted AU vehicles[172] and wearing looted AU uniforms".[173] One witness maintains that a friend of his took food from an SLA-Unity vehicle and that the food "belong[ed] to the AU".[174]

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[167] Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308 at 0313, para. 44. Summary of interview of Witness 441, DAR-OTP-0179-0105 at 0114, para. 40. Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0453, para. 104.

[168] Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308 at 0313, para. 44. Revised summary of transcript of interview of Witness 304, DAR-OTP-0171-0258 at 0275, para. 122. Summary of interview of Witness 441, DAR-OTP-0179-0105 at 0112, para. 35. Revised summary of interview transcript of Witness 306, DAR-OTP-0171-0298 and 0302, para. 30.

[169] Witness Statement 439, DAR-OTP-0175-0002 at 0037, paras. 170-174, referring to one vehicle being identified by the AU as one of those looted during the attack. Revised summary of interview transcript of Witness 312, DAR-OTP-0171-0335 at 0344 and 0345, paras. 50 and 52-53. Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0454, para. 108 ("Saleh Jerbo was using an AU vehicle"). Revised summary of transcript of interview of Witness 314, DAR-OTP-0171-0370 at 0382, para. 98, and at 0384, para. 108. Summary of Witness Statement of Witness 466, DAR-OTP-0179-0158 at 0164, para. 23. Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308 at 0314, para. 50, and at 0315, para. 53, referring to one "closed Toyota Land cruiser looted from the AU". Revised summary of transcript of interview of Witness 304, DAR-OTP-0171-0258 at 0279, para. 158. Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0443, para. 52. Transcript of interview 442, DAR-OTP-0172-0345 at 0352 and 0353, referring to Jerbo, and at 0354, line 303.

[170] Summary of Statement of Witness 466, DAR-OTP-0179-0158 at 0165, paras. 23 and 26. See also Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308 at 0314, para. 47, who refers to uniforms as being part of the loot. Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0443, para. 52. Transcript of interview 442, DAR-OTP-0172-0345 at 0358, lines 424 ff.

[171] Summary of Witness Statement of Witness 466, DAR-OTP-0179-0158 at 0162, para. 17.

[172] Summary of Witness Statement of Witness 466, DAR-OTP-0179-0158 at 0164, para. 20. Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0453, para. 106.

[173] Summary of Witness Statement of Witness 466, DAR-OTP-0179-0158 at 0162, para. 16, and, on the looted vehicles, at 0163, para. 17. Revised summary of transcript of interview of Witness 314, DAR-OTP-0171-0370 at 0384, para. 108.

[174] Summary of Witness Statement of Witness 466, DAR-OTP-0179-0158 at 0163, para. 17.

116. A significant degree of consistency also exists among the various statements which refer to the gathering and distribution of vehicles and other loot taking place among the commanders after the attack.[175] It is alleged that the distribution and sharing "was completed several days after" the attack.[176] Some witnesses allege that Abdallah Banda "took about 8 vehicles as a share".[177] Another member of Abdallah Banda's troops alleges seeing "about seven" cars coming "from the place which we had attacked", that is "the base of the AU".[178]

117. In light of the above, the Chamber is satisfied that there are substantial grounds to believe that various items of property belonging either to the AMIS, its personnel or individuals otherwise working at the compound, were appropriated by the attackers during the attack on the MGS Haskanita without the consent of the legitimate owner and were not returned.

5.2 *Subjective elements of the crime*

118. In addition, for the crime under article 8(2)(e)(v) of the Statute to be established, the perpetrator must intend to deprive the owner of the property and to appropriate it for private or personal use.

119. The attackers' awareness that the items taken away from the MGS Haskanita belonged to the AMIS can reasonably be inferred from their awareness that the compound

[175] Summary of interview of Witness 441, DAR-OTP-0179-0105 at 0115, para. 46, and at 0117, para. 52.
[176] Summary of Statement of Witness 466, DAR-OTP-0179-0158 at 0165, para. 26. Revised summary of interview transcript of Witness 312, DAR-OTP-0171-0335 at 0358, para. 136.
[177] Summary of Statement of Witness 466, DAR-OTP-0179-0158 at 0165, para. 26. Revised summary of transcript of interview of Witness 305, DAR-OTP-0171-0290 at 0294, para. 35. See also Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308 at 0314, para. 47, albeit the witness is not entirely clear as to Banda's share amounting to either 8 or 10 vehicles. Summary of interview of Witness 441, DAR-OTP-0179-0105 at 0115, para. 46. Revised summary of interview transcript of Witness 306, DAR-OTP-0171-0298 at 0303, para. 37.
[178] Revised summary of transcript of interview of Witness 0304, DAR-OTP-0171-0258 at 0279, para. 158.

belonged to the African Union.[179] This is especially apparent in respect of vehicles and uniforms. Several witnesses highlighted that AU vehicles had unique features: they were "white closed top vehicles with markings on the two sides of the vehicles",[180] these markings differentiating them from other white vehicles.[181] The unique features of AMIS uniforms ("khaki uniform [...] different from the Sudanese military uniforms") are also highlighted by the evidence.[182]

120. One witness reports that Abdallah Banda prevented one of the soldiers from driving away in one of the vehicles appropriated during the attack by saying that "some of their colleagues lost their lives to get it" (i.e. the vehicle),[183] which points to Abdallah Banda's awareness of the provenance of that vehicle. Another witness refers to Saleh Jerbo giving orders in respect of the distribution of the loot.[184]

121. The attackers' intent to keep the appropriated items for their personal use can reasonably be inferred both from the fact that those items were still in the possession of the attackers after the attack and were not returned to their legitimate owners,[185] and from the fact that, according to some witnesses, the AU markings appearing on AMIS vehicles were later removed and covered with mud.[186] Accordingly, the Chamber is satisfied that there are substantial grounds to believe that these items were appropriated with a view to devoting them to the personal use and benefit of the attackers.

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[179] *See* infra 86.

[180] Summary of Statement of Witness 466, DAR-OTP-0179-0158 at 0164, para. 20. Revised summary of transcript of interview of Witness 304, DAR-OTP-0171-0258 at 0279, para. 159.

[181] Summary of Statement of Witness 466, DAR-OTP-0179-0158 at 0164, para. 23.

[182] Revised summary of transcript of interview of Witness 314, DAR-OTP-0171-0370 at 0384, para. 108; Revised Summary of interview transcript of Witness 312, DAR-OTP-0171- 0335 at 0361, para. 152; Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0458, para. 131.

[183] Summary of Statement of Witness 466, DAR-OTP-0179-0158 at 0166, para. 29.

[184] Revised summary of interview transcript of Witness 312, DAR-OTP-0171-0335 at 0359, para. 138.

[185] See the evidence quoted above, in paragraph 115.

[186] Summary of Statement of Witness 466, DAR-OTP-0179-0158 at 0165, para. 27. Summary of Interview of Witness 441, DAR-OTP-0179-0105 at 0115, para. 45. Revised summary of transcript of interview of Witness 314, DAR-OTP-0171-0370 at 0385, para. 120.

122. On the basis of the above, the Chamber is satisfied that there are substantial grounds to believe that the subjective element (specific intent) of the crime under article 8(2)(e)(v) of the Statute is fulfilled.

123. On the basis of the above, the Chamber is satisfied that there is sufficient evidence to establish substantial grounds to believe that the crime charged under Count 1 was committed.

IX. INDIVIDUAL CRIMINAL RESPONSIBILITY

A. General remarks

124. At the outset, the Chamber notes that "without excluding any other applicable mode of liability",[187] the Prosecutor charges Abdallah Banda and Saleh Jerbo with individual criminal responsibility "as co-perpetrators or as indirect co-perpetrators under Articles 25(3)(a) and/or 25(3)(f)"[188] for the war crimes listed in Counts 1 to 3 of the DCC. The Chamber however recalls that, in accordance with article 67(1)(a) of the Statute and rule 121(1) of the Rules, the suspects must be informed in detail of the nature, cause and content of the charges brought against them. In addition, regulation 52(c) of the Regulations of the Court requires the Prosecutor to indicate in the document containing the charges the precise form of participation under articles 25 and 28 of the Statute. The Chamber will therefore restrict its analysis to the modes of liability specifically addressed by the Prosecutor in the DCC.[189] The allegations under article 25(3)(f) of the Statute have already been analysed herein under Count 1.[190]

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[187] ICC-02/05-03-09-79-Red, para. 114.

[188] Ibid.

[189] See similar view taken by Pre-Trial Chamber III in the case against Jean-Pierre Bemba in the Decision Adjourning the Hearing pursuant to Article 61(7)(c)(iii) of the Rome Statute, ICC-01/05-01/08-388, para. 39 "it is the responsibility of the Prosecutor to build and shape the case according to his statutory mandate pursuant to article 54(1)(a) of the Statute. The responsibilities of the [Pre-Trial] Chamber lie in exerting

125. In the present case, it is alleged that Abdallah Banda and Saleh Jerbo personally led and took part in the attack on the MGS Haskanita,[191] as charged in Count 2 of the DCC, and in the context of which the crimes charged under Counts 1 and 3 were also committed. Accordingly, the Chamber will start by assessing the evidence adduced in support of the allegation that the suspects are criminally responsible as co-perpetrators within the meaning of article 25(3)(a) of the Statute for one or more of the crimes charged. Only if the Chamber finds that there are no substantial grounds to believe that either Abdallah Banda or Saleh Jerbo are responsible as co-perpetrators for one or more of the crimes charged by the Prosecutor will it analyse the evidence with a view to ascertaining whether there are substantial grounds to believe that either or both of the suspects committed the crimes set out in the DCC through their subordinates, as indirect co-perpetrators.

B. Concept and elements of co-perpetration

126. The Chamber reaffirms the concept of co-perpetration based on the notion of joint control over the crime, as defined in the *Lubanga case* in the following terms:

> [t]he concept of co-perpetration is originally rooted in the idea that when the sum of the co-ordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime.[192]
>
> [t]he concept of co-perpetration based on joint control over the crime is rooted in the principle of the division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner. Hence, although none of the participants has overall control over the offence because they all depend on one another for

judicial oversight during the pre-trial proceedings and rendering its decision in accordance with article 61(7) of the Statute."

[190] See paras. 95-97 above.

[191] ICC-02/05-03/09- 79-Red, paras. 72 and 75.

[192] ICC-01/04-01/06-803-tEN, para. 326; ICC-01/04-01/07-717, para. 520.

its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.[193]

127. As consistently held in the jurisprudence of the Court, the concept of co-perpetration or joint commission of crimes encompasses both objective and subjective elements. On the basis of the evidence submitted by the Prosecutor in support of each charge, the Chamber may only confirm the charges brought against the suspects in the DCC as co-perpetrators if both the objective and the subjective elements of co-perpetration, attain the threshold of substantial grounds to believe required by article 61 of the Statute.

1. Objective Elements

128. In the view of the Chamber, the objective requirements of co-perpetration based on joint control over the crime are the following: (a) the suspect must be part of a common plan or an agreement with one or more persons; and (b) the suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which results in the fulfilment of the material elements of the crime.[194]

(a) the suspects must be part of a common plan or agreement with one or more persons

129. The first objective requirement of co-perpetration based on joint control over the crime is the existence of an agreement or common plan between two or more persons who physically carry out the elements of the crime.[195] The common plan must include an

[193] ICC-01/04-01/06-803-tENG, para. 342.
[194] ICC-01/05-01/08-424, para. 350. See also ICC-01/04-01/06-803-tEN, paras. 343 to 347; ICC-01/04-01/07-717, paras. 522 to 526; ICC-02/05-02/09-243-Red, para. 160.
[195] ICC-01/04-01/06-803-tEN, para. 343; ICC-01/04-01/07-717, para. 522.

element of criminality.[196] Such a plan does not need to be explicit as its existence can be inferred from the subsequent concerted action of the co-perpetrators.[197]

130. The Prosecutor alleges that, on 29 September 2007, after the attack by the GoS forces on the joint JEM Splinter Group, SLA-Unity and SLA-Abdul Shafie forces near their camp in Dalil Babiker, Abdallah Banda and Saleh Jerbo held a meeting with commanders and troops of JEM Splinter Group and SLA-Unity.[198] During this meeting, a plan to attack the MGS Haskanita compound was agreed upon.[199]

131. That the said meeting did indeed take place is confirmed by the evidence provided in the present case. Most of the witnesses indeed refer to a number of rebel commanders gathering in the aftermath of the attack by the GoS on rebel forces on the morning of 29 September 2007.[200] Many of the witnesses mention Abdallah Banda and Saleh Jerbo as participants in that meeting,[201] and some even claim to have seen either or both of them.[202]

132. The evidence presented by the Prosecutor provides substantial grounds to believe that, during the aforementioned meeting, the commanders, including Abdallah Banda and Saleh Jerbo, came to the agreement to attack the MGS Haskanita. One witness states that

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[196] ICC-01/04-01/06-803-tEN, paras. 344 and 345; ICC-01/04-01/07-717, para. 523.

[197] Ibid.

[198] ICC-02/05-03/09-79-Red, paras. 65 to 68.

[199] ICC-02/05-03/09-79-Red, para. 69.

[200] Revised summary of interview transcript of Witness 304, DAR-OTP-0171-0258 at 0274, para. 120; Revised summary of transcript of interview of Witness 305, DAR-OTP-0171-0290 at 0293, para. 24; Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308 at 0312, para. 36.

[201] Revised Summary of interview transcript of Witness 304, DAR-OTP-0171-0258 at 0276, para. 135; Revised Summary of transcript of interview of Witness 305, DAR-OTP-0171-0290 at 0293, para. 25; Revised summary of interview transcript of Witness 306, DAR-OTP-0171-0298 at 0302, para. 28.

[202] Revised summary of interview transcript of witness 304, DAR-OTP-0171-0258 at 0276, para. 137 "I saw the group including (...) Abdallah Banda and (...) and the officers sitting together"; Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308 at 0320, para. 93 "There was a meeting of commanders while we were hiding from the government airplane (...) There were about twenty of them sitting under a tree (...) I saw for myself, Salih Jerbo, Abdallah Banda"; Summary of Interview of Witness 441, DAR-OTP-0179-0105 at 0110, para. 22 "The commanders who were present for the meeting were the commanders from [REDACTED] movement, including (...) BANDA, (...) The SLA Unity commanders were (...) Salih Mohammad Adam JERBO".

he heard that during the meeting it was decided "to attack the AU in Haskanita".[203] In addition, several indirect witnesses confirm that immediately after the meeting the rest of commanders and troops were told to go on a "mission" to attack the MGS Haskanita compound.[204]

133. Nonetheless, very little evidence was provided at this stage to support one aspect of the allegations agreed by the Prosecutor and the Defence. In paragraph 68 of the DCC it is alleged that "[a]t this location, [Redacted] BANDA and JERBO held a meeting with commanders **and troops** of the JEM Splinter Group and the SLA-Unity [Redacted] (...)".[205] Indeed, only one witness appears to suggest that troops participated in the meeting, but later on in the statement, the same witness states that it was a commanders' meeting only, adding that he was not present at the meeting.[206] The other four witnesses who mention a meeting consistently refer only to "commanders" in reference to the persons who were present at the meeting.[207]

134. That being said, the evidence submitted at this stage provides the Chamber with substantial grounds to believe that:

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[203] Summary of Interview of Witness 441, CAR-OTP-0179-0105 at 0110, para. 25.

[204] Revised Summary of interview transcript of Witness 306, DAR-OTP-0171-0298 at 0299, para. 11 "Banda asked us to go with him on a mission. We moved during the night and he took us to attack the African Union"; Revised Summary of Transcript of Interview of Witness 307, DAR-OTP-0171-0308 at 0313, para. 39; Revised Summary of interview transcript of Witness 312, DAR-OTP-0171-0335 at 0342, para. 44 "Between 5pm and 6pm, Salih JERBO, (...) and other JEM and SLA Unity commanders and Abdallah BANDA came in their vehicles and found us there. As soon as they arrived, they ordered us to go on a mission"; Revised Summary of Transcript of Interview of Witness 314, DAR-OTP-0171-0370 at 0388, para. 144 "One thing that I am certain of is that Salih JERBO (...) came and told one of us that they were going to attack the African Union compound along with Abdallah BANDA's JEM group people"; Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0441, para. 43.

[205] ICC-02/05-03/09-79-Red, para. 68 [Emphasis adeed].

[206] Revised summary of interview transcript of Witness 304, DAR-OTP-0171-0258 at 0268, para. 80; at 0272, para. 105; at 0274 para. 120; and at 0276 para. 135.

[207] Revised Summary of transcript of interview of Witness 305, DAR-OTP-0171-0290 at 0293, para. 24; Revised Summary of interview transcripts of Witness 306, DAR-OTP-0171-0298 at 0302, para. 28; Revised Summary of Transcript of Interview of Witness 307, DAR-OTP-0171-0308 at 0320, para. 93; Summary of Interview of Witness 441, DAR-OTP-0179-0105 at 0110, para. 22.

(a) The "commanders", including Abdallah Banda and Saleh Jerbo, who masterminded the attack were not far removed from the troops that they led to attack the MGS Haskanita.[208] One witness even clarifies in relation to the structure of JEM that "(...)I got my orders from different people. Each vehicle would have a person in charge but I don't know the rank that the person would be. He would be tasked to be in charge and then next time, someone else would be in charge."[209] Another witness further explains that "(...) In each vehicle there is a commander and it was these commanders who blew a whistle (...)";[210] and

(b) Although some of the witnesses suggest that the troops were originally told or asked to go behind "government soldiers in Haskanita",[211] the statement of numerous witnesses provide the Chamber with substantial grounds to believe that when arriving at the MGS Haskanita compound, at the very latest, the troops realised that they were attacking the "African Union", having learned of which some of them decided to withdraw.[212]

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[208] Revised Summary of the Interview Transcript of Witness 304, DAR-OTP-0171-0258 at 0277, para. 140 "Abdallah Banda told us 'we are going now on a mission to Haskanita'. Said he spoke directly to the soldiers"; Revised Summary of transcript of interview of Witness 305, DAR-OTP-0171-0290 at 0293, para. 26; Revised Summary of interview transcript of Witness 306, DAR-OTP-0171-0298 at 0301, para. 22 "Abdallah Banda came to me and two colleagues (we had a vehicle) and asked us to join him in an attack against government troops" and at 0305 para. 48; Revised Summary of interview transcript of Witness 312, DAR-OTP-0171-0335 at 0354, para. 108; Revised Summary of Transcript of Interview of Witness 314, DAR-OTP-0171-0370 at 0381, para. 84 "Salih JERBO and another person came to our place and said that unfortunately the GoS attack had taken place, and we had to go and do some work. He told one of us openly and straightforward that they were going to HASKANITA and that they were going to attack the Africans in Haskanita together with JEM."

[209] Revised Summary of interview transcript of Witness 306, DAR-OTP-0171-0298 at 0305, para. 49.

[210] Revised Summary of interview transcript of Witness 312, DAR-OTP-0171-0335 at 0349, para. 80.

[211] Revised Summary of interview transcript of witness 304, DAR-OTP-0171-0258 at 0266, para. 64 and at 0276, para. 136; Revised Summary of transcripts of interview of Witness 305, DAR-OTP-0171-0290 at 0292, para. 21; Revised Summary of interview transcript of Witness 306, DAR-OTP-0171-0298 at 0301, para. 22; Revised Summary of Transcript of Interview of Witness 307, DAR-OTP-0171-0308 at 0312, para. 37; Revised Summary of interview transcript of Witness 312, DAR-OTP-0171-0335 at 0342, para. 44; Revised Summary of Transcript of Interview of Witness 314, DAR-OTP-0171-0370 at 0381, para. 84.

[212] Revised Summary of interview transcript of witness 304, DAR-OTP-0171-0258 at 0272, para. 105 "(...) the higher ranking persons had a meeting and said that there were government soldiers in Haskanita. When we

From the foregoing, the Chamber infers that there are substantial grounds to believe that at least some of the troops that eventually participated in the attack decided to continue their participation in the attack despite being able, like some others, to withdraw and thus shared with their commanders the common plan to attack the MGS Haskanita compound.

135. Based on the evidence presented by the Prosecutor, the Chamber is satisfied that there are substantial grounds to believe that both Abdallah Banda and Saleh Jerbo, together with other commanders of the JEM Splinter Group and SLA-Unity, participated in a meeting on 29 September 2007, at which the attack against the MGS Haskanita compound was decided and planned. The Chamber is also satisfied that there are substantial grounds to believe that at least some of the troops that eventually participated

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arrived in Haskánita, we found that the government soldiers had left", para. 106 "When we were going, some people discussed this mission and suggested that since there is no government soldiers present, we should not execute the attack. To implicate ourselves in the wrong place"; at 0276 para. 132 "I was about one kilometre. We stopped only one kilometre before reaching the base. We stopped there because we realised what was going on was not acceptable"; Revised Summary of transcripts of interview of Witness 305, DAR-OTP-0171-0290 at 0293, para. 26 "When we were boarding the vehicle, my vehicle commander told me and others in the same vehicle that there were government troops in Dalil Babikir and that we had to go and attack them. He did not mention the location of the attack. All of us in the camp then left on the mission. I had been in Haskanita for a long time, so I know we went from there and we attacked African Union compound.", at 0294, para. 31 "in this attack I did not participate because I did not believe in attacking AU forces", para. 33 "I performed no role in the attack", para. 36 "After the attack I questioned one of the commanders about why we attacked AU forces rather than government forces. I told him that our problem was with the government and we had no business attacking the African Union. He was not pleased with my questions."; Revised Summary of interview transcript of Witness 306, DAR-OTP-0171-0298 at 0302, para. 29 "At first we thought they attacked government troops, but when we arrived we found out it was the African Union.", para. 30 "I knew it was the African Union. The fighting was still going on when I arrived.", paragraph 31 "I did not participate in the fighting"; Revised Summary of Transcript of Interview Witness 314, DAR-OTP-0171-0370 at 0382, para. 94 "No one from our people participated in the attack. The groups moved before sunset. They took their way, and we took our way. Sunset happened while we were moving."; Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0447, para. 74 "when our leadership came back to the group where we were seated with and told us the plan to attack the African Union in HASKANITA, all of us rejected the idea. But what I saw was that everybody rejected the idea and that everybody was upset with this idea."; Summary of Transcript of Interview of Witness 442, DAR-OTP-0171-0002 at 0010, para. 35 "He said these people are going to attack the African Union. I condemned this decision and I said "why, why, why?. He said that Saleh said that he wanted the people he brought, the Abdel Shafie people, to get some cars" and para. 37 "The attack took place in that location. I went away together with other colleagues including (...) and the other soldiers who were on board this car, including my personal security."

in the attack shared with their commanders the common plan to attack the MGS Haskanita compound.

(b) the suspect and the other co-perpetrator must carry out essential contributions in a coordinated manner which results in the fulfilment of the material elements of the crime

136. The second objective requirement of co-perpetration based on joint control over the crime is that the co-ordinated essential contributions made by each co-perpetrator must result in the realisation of the objective elements of the crime.[213] When the objective elements of an offence are carried out by a plurality of persons acting within the framework of a common plan, only those to whom essential tasks have been assigned can be said to have joint control over the crime.[214] Those who have taken part in the commission of a crime by performing tasks which are not essential to the offence cannot be considered as having "committed" the crime. A person has been assigned an essential task if he or she has the power to frustrate the commission of the crime, in the way it was committed, by not performing his or her tasks.[215]

137. The Prosecutor alleges that Abdallah Banda and Saleh Jerbo, together with other commanders of the JEM Splinter Group and SLA-Unity, exercised joint control over the commission of the crimes, as each of them was assigned various essential tasks in the implementation of the plan to attack the MGS Haskanita, and each had the ability to frustrate the commission of crimes by not performing his tasks. In the terms of the DCC, Abdallah Banda and Saleh Jerbo contributed to the common plan by (1) taking part in the planning meeting and agreeing on the common plan; (2) ordering their respective troops directly and through their subordinate commanders to attack the MGS Haskanita; (3) providing the needed troops, equipment and materials to carry out the attack; (4)

[213] ICC-01/04-01/06-803-tEN, para. 346; ICC-01/04-01/07-717, para. 524.
[214] ICC-01/04-01/06-803-tEN, para. 347; ICC-01/04-01/07-717, para. 525.
[215] Ibid.

personally leading and participating in the attack together with commanders and troops, and looting of the MGS Haskanita; (5) participating personally in the distribution and/or disposal of some of the property looted from the MGS Haskanita; and (6) failing to punish any of the perpetrators from their respective groups involved in the attack.[216]

138. In charging the suspects for their individual criminal responsibility as either co-perpetrators or indirect co-perpetrators, the Prosecutor identified as essential contributions tasks that might be relevant for either mode of liability. In light of the clarification provided above as to the initial assessment of the suspects' responsibility as co-perpetrators, the subsequent analysis will only deal with those contributions that the Chamber considers relevant to the determination of whether or not there are substantial grounds to believe that the suspects may be held responsible as co-perpetrators for the crimes listed in the DCC.

(b.1) Designing and planning of the attack

139. As indicated in paragraph 135 above, based on the evidence submitted by the Prosecutor, the Chamber is satisfied that there are substantial grounds to believe that both Abdallah Banda and Saleh Jerbo, together with other commanders of the JEM Splinter Group and the SLA-Unity, designed and planned the attack against the MGS Haskanita.

(b.2) Ordering and providing troops, equipment and materials necessary to carry out the attack

140. In the view of the Chamber, before analysing the second and third contributions identified by the Prosecutor as the essential tasks that the suspects would have carried out for the implementation of the common plan, it is necessary to establish the overall role

[216] ICC-02/05-03/09-79-Red, para. 119.

played by Abdallah Banda and Saleh Jerbo amongst the troops that allegedly participated in the attack to the MGS Haskanita together with them. The determination of this role will be relevant to establishing whether the ordering and provision of troops, equipment and material did occur and could have been carried out by Abdallah Banda and/or Saleh Jerbo.

141. Abdallah Banda's role as *Commander-in-Chief* or *General Commander* of JEM[217] and his dismissal from the main JEM movement on 30 June 2007 is mentioned by the witnesses,[218] who also alleges that, after his dismissal, Abdallah Banda left with some troops and vehicles belonging to the main JEM,[219] [REDACTED][220] and [REDACTED] went towards Haskanita where more commanders, vehicles and troops joined them.[221] The witnesses also acknowledge that, at the time of the attack, Abdallah Banda's forces were reduced in number as a result of Dr. Khalil Ibrahim's recovering troops and vehicles a few days before the attack,[222] coupled with the fact that the remaining forces loyal to Abdallah Banda were seriously affected by the fight with government soldiers on the morning of the 29 of September 2007 near Dalil Babikir.[223] Abdallah Banda's role in the autonomous faction of JEM-Splinter Group, is also mentioned by the witnesses.[224] In view of the

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[217] Revised summary of transcript of interview of Witness 304, DAR-OTP-0171-0258 at 0259, para. 9, at 0260, para. 21 and at 0262 para. 35; Revised Summary of transcript of interview of Witness 305, DAR-OTP-0171-0290, at 0295 para. 42; Revised summary of interview transcript of Witness 306, DAR-OTP-0171-0298, at 0299 para. 10; Revised summary of interview transcript of Witness 312, DAR-OTP-0171-0335, at 0365 para. 185; Statement of Witness 439, DAR-OTP-0175-0002, at 0012 para. 49, and at 0013 paras. 57 and 58; Summary of Interview of Witness 441, DAR-OTP-0179-0105, para. 5.

[218] Statement of Witness 439, DAR-OTP-0175-0002, at 0020 para. 89.

[219] Statement of Witness 439, DAR-OTP-0175-0002, at 0020 para. 91; Summary of Interview transcript of Witness 304, DAR-OTP-0171-0258, at 0265 para. 61, at 0268 para. 82 and at 0270 para. 93.

[220] Statement of Witness 439, DAR-OTP-0175-0002, at 0022 para. 96; Revised Summary of Interview transcript of Witness 304, DAR-OTP-0171-0258, at 0265 paras. 59 and 62 and at 0267 para. 74.

[221] Statement of Witness 439, DAR-OTP-0175-0002, at 0025 para. 109 and at 0029 para. 132; Revised Summary of Interview transcript of Witness 304, DAR-OTP-0171-0258, at 0269 para. 89, at 0271 para. 99.

[222] Statement of Witness 439, DAR-OTP-0175-0002-R01, at 0036 para. 163; Summary of Witness Statement of Witness 466, DAR-OTP-0179-0158, at 0160 para. 11.

[223] Revised Summary of Interview transcript of Witness 304, DAR-OTP-0171-0258, at 0271 para. 101.

[224] Revised summary of transcript of interview of Witness 304, DAR-OTP-0171-0258, at 0267 para. 74, at 0269 para. 86, at 0277 para. 138; Revised Summary of transcript of interview of Witness 305, DAR-OTP-0171-0290, at 0292 para. 18 and at 0295 para. 45; Revised summary of interview transcript of Witness 306, DAR-OTP-0171-0298, at 0302 para. 27, at 0303 para. 36 and at 0304 para. 44; Revised summary of transcript of interview

foregoing, the Chamber is satisfied that there are substantial grounds to believe that at the time of the attack to the MGS Haskanita on 29 September 2007, Abdallah Banda had control over some vehicles - among 4 to 12 vehicles according to the witnesses - ammunition and troops,[225] which recognised him as their military commander. Most significantly, one witness states that Abdallah Banda was "the commander in chief of the mission to attack the AU compound".[226]

142. The role of Saleh Jerbo as the "Operations Room Commander" of the Sudan Liberation Movement-Unity Command ("SLA-Unity"), in which capacity he was the highest ranking military commander of the faction in the area of Haskanita between May 2007 and 30 September 2007, is mentioned by the witnesses.[227] The allegation that

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of Witness 307, DAR-OTP-0171-0308, at 0331 para. 169; Revised summary of interview transcript of Witness 312, DAR-OTP-0171-0335, at 0346 para. 62, at 0347 para. 70 and at 0363 para. 174; Summary of Witness statement of Witness 466, DAR-OTP-0179-0159 para. 5, at 0160 paras. 10 and 12, and at 0167 para. 33; Summary of Interview of Witness 441, DAR-OTP-0179-0105, at 0110 para. 22; Summary of Transcript of Interview of Witness 442, DAR-OTP-0171-0002, at 0026 para. 101; Summary of interview transcript of Witness 433, DAR-OTP-0170-0435, at 0440 para. 33.

[225] The exact number of vehicles and troops under the control of Abdallah Banda is not clear from the evidence. The witnesses however agree that the forces of the SLA-Unity were more numerous that those of the JEM Splinter Group. See Revised Summary of interview transcript of Witness 306, DAR-OTP-0171-0298, at 0300 para. 14 "Banda took four vehicles and between 30-40 people for the mission to Haskanita" at 0301 para. 23 and para. 24 "To clarify, there were eight vehicles from the JEM group altogether. Four belonged to our group and four to Banda. At that time, we considered him as our commander because we did not know he had been dismissed. The SLA group has about 20 vehicles. So there were about 24 to 27 vehicles altogether "; Revised Summary of interview transcript of witness 304, DAR-OTP-0171-0258, at 0277 para. 144 "There were more members in the SLA group that there were in the JEM group. The whole group had 25 cars. (...)Among these about 11 vehicles belong to the JEM"; Revised Summary of transcript of interview of Witness 305, DAR-OTP-0171-0290, at 0292 para. 18 "Abdallah Banda had about 12 vehicles"; Summary of Interview of Witness 441, DAR-OTP-0179-0105, at 0113 para. 39 "During the attack on the AU compound, the JEM-[REDACTED] faction had 8 vehicles involved in the Haskanita attack"; Revised Summary of interview transcript of Witness 312, DAR-OTP-0171-0335, at 0348 para. 73 "Salih has more soldiers than BANDA who had only seven vehicles by then. I could estimate the number of Abdallah BANDA's soldiers as between 55 and 60"

[226] Summary of Interview of Witness 441, DAR-OTP-0179-0105, at 0112, para. 35 and at 0116 para. 48.

[227] Summary of Transcript of Interview of Witness 442, DAR-OTP-0171-0002, at 0021 para. 79; Summary of Witness statement of Witness 466, DAR-OTP-0179-0158, at 0164 para. 21; Revised Summary of transcript of interview of Witness 305, DAR-OTP-0171-0290, at 0293 para. 25; Revised summary of interview transcript of Witness 312, DAR-OTP-0171-0335, at 0342 para. 41; Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308, at 0321 para. 93; Summary of interview transcript of Witness 433, DAR-OTP-0170-0435, at 0439 para. 26.

sometime in September 2007, the SLA-Abdul Shafie forces based in eastern Jebel Marra were attacked and that Saleh Jerbo and troops under his control came to their rescue, reaching an agreement with his leaders for joint operations, is also mentioned by the witnesses.[228] Based on the evidence submitted at this stage the Chamber finds substantial grounds to believe that Saleh Jerbo had control over around 24 to 26 vehicles, in addition to ammunition and the troops of the combined SLA-Unity and SLA-Abdul Shafie, which recognised him as their military commander at the time of the attack to the MGS Haskanita.[229] Most significantly, one witness refers to him as being Abdallah Banda's "second in command in the joint group"[230] during the attack on the AU Haskanita; another states that he was "the chief-of-staff, what they called état majeur of the movement",[231] in which capacity he led the attack on the MGS Haskanita compound.

143. The Prosecutor alleges that Abdallah Banda and Saleh Jerbo contributed to the common plan by ordering their troops to attack the MGS Haskanita compound and by providing the needed troops, equipment and materials to carry out the attack.[232] As

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[228] Revised Summary of interview transcript of Witness 307, DAR-OTP-0171-0308, at 0311 para. 27; Revised Summary of interview transcript of Witness 312, DAR-OTP-0171-0335, at 0342 para. 41, at 0356 para. 121; Revised Summary of interview transcript of Witness 314, DAR-OTP-0171-0370, at 0377 para. 61, at. 0378 para 62, at 0378 para. 64, at 0378 para. 65 and at 0379 para. 71; Summary of interview transcript of Witness 442, DAR-OTP-0170-0002, at 0010 para. 37, at 0044 para. 171; Summary of interview transcript of Witness 433, DAR-OTP-0170-0435, at 0445 para. 63 and at 0455 para. 115.

[229] The exact number of vehicles and troops under the control of Salih Jerbo is not clear from the evidence. The witnesses however agree that the forces of the SLA-Unity were more numerous that those of the JEM Splinter Group. See Revised Summary of interview transcript of Witness 306, DAR-OTP-0171-0298, at 0301 para. 23 "(...)the Sudan Liberation Movement group had 24 to 26 vehicles", at 0301 para. 24 "The SLA group has about 20 vehicles. So there were about 24 to 27 vehicles altogether"; Revised Summary of interview transcript of witness 304, DAR-OTP-0171-0258, at 0277 para. 144 "There were more members in the SLA group that there were in the JEM group. The whole group had 25 cars. And these 25 vehicles were divided into two (...) 14 belong to the SLA group"; Revised Summary of transcript of interview of Witness 305, DAR-OTP-0171-0290, at 0292 para. 18 "SLA Unity had about 21 vehicles"; Summary of Interview of Witness 441, DAR-OTP-0179-0105, at 0113 para. 38 "About 25 vehicles participated in the attack on the part of SLA-Unity"; Revised Summary of interview transcript of Witness 312, DAR-OTP-0171-0335, at 0348 para. 73 "Salih has more soldiers than BANDA (...) the number of soldiers of Salih JERBO, as between 250 and 300 soldiers."

[230] Summary of Interview of Witness 441, DAR-OTP-0179-0105, at 0116 para. 48.

[231] Revised summary of interview transcript of Witness 312, DAR-OTP-0171-0335, at 0347 para. 70.

[232] ICC-02/05-03/09-79-Red, para. 119.

discussed earlier,[233] after the common plan was agreed, the commanders ordered their respective troops to attack the MGS Haskanita.[234] The Chamber is therefore satisfied that there are substantial grounds to believe that Abdallah Banda and Saleh Jerbo, together with other commanders, contributed to the common plan by ordering the troops under their control at the time to commit the attack. Based on the evidence submitted, the Chamber is further satisfied that there are substantial grounds to believe that the vehicles, ammunition and troops referred to above formed the forces of the JEM Splinter Group, SLA-Unity and SLA-Abdul Shafie that were provided by Abdallah Banda and Saleh Jerbo to launch the attack on the MGS Haskanita.

(b.3) Personal participation in leading the attack and looting of property from the MGS Haskanita

144. The DCC alleges that the attack on the MGS Haskanita, in the context of which the charged crimes of pillaging and murder - whether committed or attempted - were perpetrated, was carried out by troops "from the JEM Splinter Group and the SLA-Unity and SLA-Abdul Shafie forces, led by BANDA, JERBO and other unit commanders".[235]

145. The Prosecutor further alleges that during the attack the JEM Splinter Group and SLA-Unity troops also engaged in a large-scale looting of the MGS Haskanita compund.[236] The attackers looted property belonging to AMIS, the personal property of AMIS personnel, and money belonging to PAE from their safe-deposit box.[237] The Prosecutor

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[233] *See supra* para. 132.
[234] Revised Summary of interview transcript of witness 304, DAR-OTP-0171-0258, at 0277 para. 138, at 0277 para. 140, at 0286 para. 199; Revised Summary of interview transcript of Witness 306, DAR-OTP-0171-0298, at 0299 para. 11; Summary of Transcript of Interview of Witness 442, DAR-OTP-0171-0002, at 0030 para. 116.
[235] ICC-02/05-03/09-79-Red, para.72.
[236] ICC-02/05-03/09-79-Red, para. 85.
[237] Ibid.

further alleges that Abdallah Banda and Saleh Jerbo looted fuel from inside the MGS Haskanita compound.[238]

146. Most witnesses explicitly indicate that JEM,[239] or the splinter group headed by [REDACTED] Abdallah Banda,[240] personally led by Abdallah Banda[241] was one of the groups[242] responsible for the attack on the MGS Haskanita. Numerous witnesses, including insiders,[243] refer to SLA-Unity, personally led by Saleh Jerbo[244] as being responsible for the

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[238] Ibid.

[239] Particularly important appear the statements issued by members of JEM, who provide first-hand evidence that their own group carried out the attack. See Summary of Witness statement of Witness 466, DAR-OTP-0179-0158, at 0159 para. 7; Revised summary of transcript of interview of Witness 305, DAR-OTP-0171-0290, at 0293 to 0294, paras. 27 to 37; Revised summary of interview transcript of Witness 304, DAR-OTP-0171-0258, at 0267 para. 76 read in conjunction with at 0274 para. 120; Revised summary of interview transcript of Witness 306, DAR-OTP-0171-0298, at 0299 para. 11.

[240] Summary of interview of Witness 441, DAR-OTP-0179-0105, at 0113 para. 37; Statement of Witness 439, DAR-OTP-0175-0002, at 0038 para. 177 and at 0039 para. 178; Revised summary of interview transcript of Witness 312, DAR-OTP-0171-0335, at 0347 para. 71; Summary of interview transcript of Witness 433, DAR-OTP-0170-0435, at 0443 paras. 51 and 52; Revised summary of Transcript of interview of Witness 314, DAR-OTP-0171-0370, at 0382 para. 95, at 0388 para. 144 and at 0393 para. 172; . Revised summary of interview transcript of Witness 304, DAR-OTP-0171-0258, at 0273 para. 111.

[241] Revised Summary of interview transcript of Witness 304, DAR-OTP-0171-0258, at 0278 para. 147 "Abdallah Banda was in the convoy in the front (...) and para. 149 "I saw Banda in the front car", at 0282 para. 171 '(...) I confirm that Abdallah Banda was involved in the attack."; Revised Summary of transcript of interview of Witness 305, DAR-OTP-0171-0290, at 0294 para. 29 "Abdallah Banda (...) who were all in the lead vehicles, opened fire and started shooting into the compound."; Revised Summary of interview transcript of Witness 0312, DAR-OTP-0171-0335, at 0347 para. 70 "This operation was led by (...) and Abdallah BANDA who was the commander in chief of the army"; Summary of Interview of Witness 441, DAR-OTP-0170-0105, at 0115 para. 47 "At the time of the attack on the AU compound in Haskanita, all the soldiers were following the instructions of BANDA"; Summary of Witness Statement of Witness 466, DAR-OTP-0179-0070, at 0072 para. 13 "During Ramadan In September 2007, (...) BANDA (...) attacked the AU base at Haskanita".

[242] Statement of Witness 439, DAR-OTP-0175-0002, at 0031 para. 142. .

[243] Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308, at 0313 to 0314, paras. 39 to 46; Revised summary of interview transcript of Witness 312, DAR-OTP-0171-0335, at 0342 to 0343, paras. 44 to 45 and at 0347 para. 71.

[244] Statement of Witness 439, DAR-OTP-0175-0002-R01, at 0031 para. 142 "The main force which attacked the African Union compound was the force under the leadership of Salih JERBO"; Revised Summary of Transcript of Interview of Witness 307, DAR-OTP-0171-0308, at 0313 para. 40 "Salih Jerbo opened fire on the AU forces"; Revised Summary of interview transcript of Witness 312, DAR-OTP-0171-0335, at 0347 para. 70 "This operation was led by Salih Muhammad JERBO as he was the chief-of-staff, what they called état majeur of the movement"; Summary of Interview of Witness 441, DAR-OTP-0170-0105, at 0115 para. 47 "At the time of the attack on the AU compound in Haskanita, all the soldiers were following the instructions of

attack on the MGS Haskanita.[245] The witnesses also report that some troops from the SLA-Abdul Shafie[246] faction participated in the attack under the leadership of Saleh Jerbo.[247] The evidence presented by the Prosecutor supports the finding that there are substantial grounds to believe that both Abdallah Banda[248] and Saleh Jerbo[249] personally participated as leaders of their respective troops in the actual attack on the MGS Haskanita.[250] One witness refers to Abdallah Banda as "the commander in chief of the mission to attack the AU compound"[251] and to Saleh Jerbo and "his second in command".[252] Another witness recalls seeing "Abdallah Banda in the front car"[253] once the convoy arrived at the MGS and started firing at the compound. Other witnesses explicitly recount that, upon reaching the

(...), JERBO"; Summary of Transcript of Interview of Witness 442, DAR-OTP-0171-0002, at 0031 "Jerbo was directly responsible for the army. He was leading the force".

[245] Summary of Witness statement of Witness 466, DAR-OTP-0179-0158, at 0162 para. 16 and 17; Summary of interview transcript of Witness 433, DAR-OTP-0170-0435, at 0441, paras. 39 and 40 and at 0447 para. 73; Revised summary of transcript of interview of Witness 314, DAR-OTP-0171-0370, at 0382 para. 95, at 0386 para. 123, at 0388 para. 144 and at 0393 para. 172; Statement of Witness 439, DAR-OTP-0175-0002, at 0031 para. 142.

[246] Only some of them as the other seem not to have agreed with the attack as is reported by the witnesses. See Summary of interview transcript of Witness 433, DAR-OTP-0170-0435, at 0441 para. 39 "Salih Jerbo talked to one of our leaders and informed him that they were going to attack HASKANITA and he mentioned that, because of the African Union, they were attacked. Our leadership didn't agree. We as a faction we had representatives within the African Union and we are committed to our international engagements. So we rejected the idea of attacking the African Union"; Revised Summary of Transcript of Interview of Witness 314, DAR-OTP-0171-0370, at 0382 paragraph 94 "No one from our people participated in the attack. (...)They took their way, and we took our way"

[247] Revised Summary of Transcript of Interview of Witness 307, DAR-OTP-0171-0308, at 0322 para. 101 "Those among us who took part in the Haskanita attack were 20 to 30 soldiers (...) The rest of the 170 people were in the truck and the driver took them in another direction."; Revised Summary of interview transcript of Witness 312, DAR-OTP-0171-0335, at 0359 para. 144.

[248] Revised summary of transcript of interview of Witness 305, DAR-OTP-0171-0290, at 0293 para. 28, at 0293 to 0294 para. 29, at 0294 para. 35 and at 0295 para. 45, Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308, at 0314 para. 46; Revised summary of interview transcript of witness 304, DAR-OTP-0171-0258, at 0278 para. 149; Revised summary of interview transcript of Witness 0312, DAR-OTP-0171-0335, at 0366 para. 188.

[249] Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308, at 0313 paras. 40, 41 and 44, at 0314 para. 46 and at 0322 para. 107; Summary of interview transcript of Witness 433, DAR-OTP- 0170-0435, at 0441 para. 40.

[250] Revised summary of interview transcript of Witness 312, DAR-OTP-0171-0335, at 0347 paras. 70 and 71.

[251] Summary of interview of Witness 441, DAR-OTP-0179-0105, at 0112 para. 35 and at 0116 para. 48.

[252] Summary of interview of Witness 441, DAR-OTP-0179-0105, at 0116 para. 48.

[253] Revised summary of interview transcript of Witness 304, DAR-OTP-0171-0258, at 0278 para. 149.

MGS Haskanita, Abdallah Banda and Saleh Jerbo,[254] "all in the lead vehicles, opened fire and started shooting into the compound".[255]

147. The witnesses also report that both Abdallah Banda and Saleh Jerbo personally participated in the looting of goods from the MGS Haskanita. One direct witness refers to Abdallah Banda and Saleh Jerbo as being among those who personally took part in the looting, taking *inter alia* vehicles, food and fuel.[256] Some direct witnesses mention that Abdallah Banda took 8 vehicles belonging to the MGS Haskanita, whilst Saleh Jerbo took 9;[257] these figures are consistent with the 17 vehicles the AMIS personnel reports were stolen from the MGS Haskanita compound.[258]

148. On the basis of the evidence submitted, the Chamber is satisfied that there are substantial grounds to believe that Abdallah Banda and Saleh Jerbo together with troops of the JEM Splinter Group, the SLA-Unity and the SLA-Abdul Safie, lead by them and other commanders, personally participated in the attack on the MGS Haskanita during and in the context of which the crimes charged by the Prosecutor in the DCC were committed. Further, on the basis of the evidence submitted, the Chamber is satisfied that

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[254] Revised summary of transcript of interview of Witness 307, DAR-OTP-0171-0308, at 0313 para. 40.

[255] Revised summary of transcript of interview of Witness 305, DAR-OTP-0171-0290, at 0293 to 0294 para. 29.

[256] Revised Summary of Transcript of Interview of Witness 307, DAR-OTP-0171-0308, at 0313 para. 44 "Abdallah Banda and Salih Jerbo and their troops entered inside the compound and came out with loot. Those who were from the area took their loot away. They started taking vehicles from the compound. They fought each other over who will take the vehicles. Officers threatened soldiers. If you were a soldier and you tried to loot a vehicle and there was a commander, the commander would threaten the soldier and loot the vehicle himself. When they came out of the compound everyone went in their own direction with their looted vehicles. They had looted refrigerators, laptop computers, cell phones, and dollars in cash, all belonging to the AU", at 0314 para. 46 "I saw Abdallah Banda and Salih Jerbo enter the compound and the buildings inside the compound. Those who looted vehicles all went their separate way. They brought fuel out of the compound. They put it in the Renault truck and we used that to leave to another place", at 0322 para. 107 "I saw Salih Jerbo load three barrels of fuel in the vehicle that was looted from the African Union".

[257] Summary of Witness Statement of Witness 466, DAR-OTP-0179-0070, at 0072 para. 14; Summary of Interview of Witness 441, DAR-OTP-0179-0105, at 0115 para. 46; Revised Summary of transcript of interview of Witness 305, DAR-OTP-0171-0290, at 0294 para. 25; Revised Summary of interview transcript of Witness 306, DAR-OTP-0171-0298, at 0303 para. 37.

[258] Statement of Witness 355, DAR-OTP-0165-0352-R01, at 0361 para. 61; Statement of Witness 315, DAR-OTP-0161-1159-R01, at 1172 para. 53; Statement of Witness 419, DAR-OTP-0165-0489-R01, at 505 para. 83.

there are substantial grounds to believe that Abdallah Banda and Saleh Jerbo personally took part in the looting of goods from the MGS Haskanita compound.

149. In light of the foregoing, the Chamber is satisfied that there are substantial grounds to believe that Abdallah Banda and Saleh Jerbo were part of a common plan to attack the MGS Haskanita compound and made essential contributions in a coordinated manner -namely designing and planning the attack, ordering and prov ding the necessary troops, equipment and materials as well as personally participating and leading the attack and looting property from the MGS Haskanita- which resulted in the fulfilment of the material elements of the crimes charged by the Prosecutor in the DCC.

2. Subjective Elements

150. In the view of the Chamber, the subjective requirements of co-perpetration are the following: (a) the suspect must fulfil the subjective elements of the crimes charged; (b) the suspect and the other co-perpetrators must be mutually aware and mutually accept that implementing the common plan will result in the fulfilment of the objective elements of the crimes; and (c) the suspect must be aware of the factual circumstances enabling him or her to jointly control the crimes.[259]

(a) the suspect must fulfil the subjective elements of the crimes charged

151. Co-perpetration based on joint control over the crime requires above all that the suspects fulfil the subjective elements of the crime with which they are being charged, including any required *dolus specialis* or ulterior intent for the type of crime involved.[260]

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[259] ICC-01/05-01/08-424, para. 351; See also ICC-01/04-01/06-803-tEN, paras. 349 to 367; ICC-01/04-01/07-717, paras. 527 to 539; ICC-02/05-02/09-243-Red, para. 161.

[260] ICC-01/04-01/06-803-tEN, para. 349; ICC-01/04-01/07-717, para. 527; ICC-01/05-01/08-424, para. 351.

152. Article 30 of the Statute sets out the general subjective element for all the crimes within the jurisdiction of the Court, stipulating that "unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge."

153. Article 30 specifically defines both elements, intent and knowledge: "a person has intent where: (a) in relation to a conduct, that person means to engage in the conduct; and (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events." Knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. Article 30, therefore, encompasses those situations in which the suspect knows that his or her conduct will cause a consequence and consciously carries out the conduct with the intent to bring about that consequence. It also implies situations in which the suspect means to engage in the conduct without the intent to bring about a consequence, but is aware that such a consequence will occur in the ordinary course of events.

154. As regards the subjective elements of the crime charged in Count 2, the Chamber recalls its earlier findings that there are substantial grounds to believe that Abdallah Banda and Saleh Jerbo issued orders to their respective troops to attack the MGS Haskanita,[261] personally participated in the attack and led their troops during the attack.[262] In view of these findings, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that Abdallah Banda and Saleh Jerbo meant to engage in the attack on the MGS Haskanita. As established earlier in this decision, there are substantial grounds to believe that Abdallah Banda and Saleh Jerbo were aware of the factual circumstances that

[261] *See supra* para. 143.
[262] *See supra* paras. 146 to 148.

established the protection to which the MGS Haskanita was entitled under the international law of armed conflicts.[263]

155. As regards the subjective elements of the crime charged in Count 1, the Chamber notes that the evidence presented at this stage does not provide substantial grounds to believe that either one or both of the suspects specifically meant to cause killings of protected AMIS personnel as a consequence of the attack to the MGS Haskanita. It is neither alleged in the DCC, nor supported by the evidence submitted by the Prosecutor, that either Abdallah Banda or Saleh Jerbo personally shot, killed or injured any of the victims. The Chamber however recalls the reasoning developed above as to the existence of substantial grounds to believe that Abdallah Banda and Saleh Jerbo (i) were among the planners of the attack during which the murders – committed and attempted - took place;[264] (ii) gave orders and provided troops, equipment and material necessary to carry out the attack on the MGS Haskanita[265] and (iii) both personally participated in the attack.[266]

156. The manner in which the attack was planned and conducted, and particularly, the heavy weaponry which the attackers - including Abdallah Banda and Saleh Jerbo - used during the attack, as described by witnesses belonging to the rebel groups that participated in the attack[267] and confirmed by AMIS personnel,[268] provide substantial

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[263] *See supra* para. 86.

[264] *See supra* para. 132.

[265] *See supra* para. 143.

[266] *See supra* paras. 146 to 148.

[267] Revised Summmary of interview transcript of Witness 304, DAR-OTP-0171-0258, at 0276 para. 130, at 0283 para. 182 "The car of Abdallah Banda had a Gronof automatic mounted on it. It has a kind of belt and can take 200 bullets"; Revised Summary of transcripts of interview of Witness 305, DAR-OTP-0171-0290, at 0293 para. 28 "The lead vehicles had the following weapons: (...) JEM (commanders of the artillery), had a weapon called "Sol Sol" (multiple rocket launcher), (...) SLA-Unity had an anti-aircraft machine gun with two barrels, (. .) had a destroyer 106; the vehicle of Abdallah BANDA was provided with dushka. (...) had a dushka (...) had a destroyer 106. The rest of the SLA vehicles had dushkas and other weapons mounted on them."; Revised Summary of interview transcript of Witness 306, DAR-OTP-0171-0298, at 0304 para. 42; Revised Summary of Transcript of Interview of Witness 307, DAR-OTP-0171-0308, at 0313 para. 40 "(...) Salih Jerbo opened fire on the AU forces. The AU responded but they were shooting in the air.", para. 41

grounds to believe that, Abdallah Banda and Saleh Jerbo knew that, under these circumstances, at the very minimum, killings would occur "in the ordinary course of events".[269] The fact of orchestrating an attack by numerous and heavily armed troops on a relatively small peacekeeping mission itself implies the virtual certainty that killings

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"Salih Jerbo (...) put pressure on the gate", para. 42 "Then a vehicle with a "B10" weapon that had a long barrel targeted the armoured tank. They advanced towards each other. Our armoured vehicle crossed the barbed wire fence. The "B10" shot the armoured tank and destroyed it. When the armed tank broke down they attacked the compound"; Revised Summary of interview transcript of Witness 312, DAR-OTP-0171-0335, at 0350 paras. 86 to 89 "our people had 106 weapons and dushkas (...) Our people had dushkas but they didn't use them much. They used the anti-aircraft weapons, of which they had two (...) If they had hit a vehicle they would have completely destroyed it and killed those who were in it (...) The 106 weapon is a big gun loaded on a small vehicle. It has long barrel. It is loaded from behind, and its shell is 106 calibre. It is used against solid objects. During the attack this weapon was used to destroy the armoured vehicles and buildings. It seems to me that they destroyed one tank", at 0351 para. 90 "During the attack, the anti-aircraft weapon was also used against the African Union tanks. The dushkas were used against persons. Light weapons, GMs and Kalashnikovs were also used"; Revised Summary of interview transcript of Witness 314, DAR-OTP- 0171-0370, at 0382 para. 92 para. 102 "JERBO came there in his old vehicle, which was provided with a DOSHKA gun."; Summary of interview transcript of Witness 433, DAR-OTP-0170-0435, at 0440 para. 37 "The vehicle with the 23 Calibre weapon on it belonged to SLA Unity, SALIH JERBO's group.", at 0449 para. 83 "The commanders that I saw at the meeting were all armed, as were the soldier. Even in their vehicles they have machine guns. I don't know the number of the vehicles with machine guns. But many of their vehicles were loaded with heavy weaponry. They had what they called 106 caliber machine gun and another machine gun called Bi-diameter caliber machine gun, and other heavy guns mounted on their vehicles.", at 0453 para. 102; Summary of interview transcript of Witness 441, DAR-OTP-0179-0105, at 0113 para. 38.

[268] Statement of Witness 355, DAR-OTP-0165-0352-R01, at 0359 para. 44 "fighters armed with anti aircraft guns, some artillery guns, and multiple RPG launchers attacked the Haskanita MGS. They over-powered the AU protection forces."; Statement of Witness 416, DAR-OTP-0165-0381-R01, at 0389 para. 36 "I could tell that the attackers used AK-47s and RPGs", at 0390 para. 40 "I later discovered that the bullet that was fired into my body was from an AK-47."; Statement of Witness 417, DAR-OTP-0165-0424-R01, at 0434 para. 45; Statement of Witness 419, DAR-OTP-0165-0489-R01, at 0504 para. 75 "In the beginning of the attack, the guards at the northern entrance gates (...) were shot and killed. The attackers fired various types of weapons of various calibre, including sol-sol missiles. The sol-sol missiles, 12.7mm and 14mm weapons were used. The fire was very intense"; Statement of Witness 420, DAR-OTP-0165-0521-R01, at 0531 para. 52 "The attackers came in vehicles. They used machine guns and rocket-propelled grenades (RPGs) to take over the MGS"; Statement of Witness 447, DAR-OTP-0169-1160-R01, at 1172 para. 80.

[269] It is also significant to note that killings occurred in similar attacks on the African Union. See Revised Summary of interview transcript of Witness 304, DAR-OTP-0171-0258, at 0266, para. 63 "There were some other people from other movements in 2005, these people took some vehicles from the organizations (...) Many people were killed from those groups". See also Revised Summary of interview transcript of Witness 312, DAR-OTP-0171-0335, at 0349 para. 79 "They don't have this culture of briefing the soldiers. The standard instruction we have is when you attack you kill the enemy" Besides, as Witness 315 notes, "(...) based on our findings, these officers were not killed in action, but murdered." See Statement of Witness 315, DAR-OTP-0164-1159 at 1171 and 1172, paras. 50 to 52.

would ensue, a certainty which is consistent with the subjective element as defined in article 30 of the Statute.

157. The Chamber finds, on this basis, that there is sufficient evidence to establish substantial grounds to believe that both Abdallah Banda and Saleh Jerbo, meant to engage in the attack on the MGS Haskanita and, although they did not necessarily mean to cause as a consequence the crime proscribed in article 8(2)(c)(i) of the Statute, they were at least aware that in the ordinary course of events, violence to life in the form of murder would occur in the course of such attack. The Chamber further recalls its finding that there is sufficient evidence to establish substantial grounds to believe that both Abdallah Banda and Saleh Jerbo were aware of the factual circumstances that established the AMIS peacekeeping personnel's status of persons taking no active part in hostilities at the time of the attack.[270]

158. As regards the subjective elements of the crime charged in Count 3, the Chamber recalls its finding that there are substantial grounds to believe that Abdallah Banda and Saleh Jerbo personally participated in the appropriation of numerous items during the attack on the MGS Haskanita.[271] The Chamber further recalls that it emerges from the witness statements that after the attack the commanders gathered and distributed the loot.[272] The Chamber is thus satisfied that there is sufficient evidence to establish substantial grounds that Abdallah Banda and Saleh Jerbo meant to engage in the pillaging of vehicles, fuel and goods belonging to the AMIS personnel, and knew that their actions would bring about the consequence of the crime proscribed in article 8(2)(e)(v) of the Statute. Furthermore, the Chamber recalls its finding that there are substantial grounds to

[270] *See supra* para. 86.
[271] *See* supra para. 115.
[272] *See* supra para. 116.

believe that both Abdallah Banda and Saleh Jerbo intended to deprive the owners of their property and appropriated the looted items for their personal use.[273]

(b) the suspect and the other co-perpetrators must be mutually aware and mutually accept that implementing the common plan will result in the fulfilment of the objective elements of the crimes

159. Turning to the second subjective element required to establish responsibility as a co-perpetrator, the Chamber again recalls its findings regarding the participation of Abdallah Banda and Saleh Jerbo in the meeting at which the attack on the MGS Haskanita was decided and planned,[274] and their leadership and participation in the attack together with other commanders and troops.[275] In view of these findings and the foregoing discussion of the subjective elements of the crimes committed in the course of the attack, the Chamber is satisfied that there is sufficient evidence to establish substantial grounds to believe that Abdallah Banda and Saleh Jerbo were mutually aware that the implementation of the common plan would result (with respect to murder in the ordinary course of events) in the realisation of the objective elements of the crimes charged by the Prosecutor.

(c) the suspect must be aware of the factual circumstances enabling him or her to jointly control the crimes

160. Finally, the Chamber considers that the concept of co-perpetration based on joint control of the crimes requires the awareness by the suspects of the factual circumstances enabling them to jointly control the crime.[276] In particular, it is required that each of the suspects be aware that: (a) his or her role is essential to the implementation of the common

[273] *See* supra para. 119.
[274] *See* supra para. 132.
[275] *See* supra paras. 146 to 148.
[276] ICC-01/04-01/07-717, para. 538; ICC-01/04-01/06-803-tEN, para. 366.

plan; and (b) he or she can –by reason of the essential nature of his or her task(s)- frustrate the implementation of the common plan in the way the crime is committed, by refusing to perform the task(s) assigned to him or her.[277]

161. The Chamber recalls its findings regarding the suspects' positions as leaders of the troops involved in the attack on the MGS Haskanita,[278] the suspects' essential contributions to the plan and execution of the attack[279] and their personal participation in the attack.[280] Having regard to their prominent role in the attack, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that Abdallah Banda and Saleh Jerbo were aware both that their role in the commission of the crimes charged was essential, and that any of them could frustrate the implementation of the common plan, in the way the crime was committed, by refusing to perform the tasks assigned to them in the attack on the MGS Haskanita.

Conclusion

162. Accordingly, the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that Abdallah Banda and Saleh Jerbo are criminally responsible as co-perpetrators within the meaning of article 25(3)(a) of the Statute for each of the crimes charged. This finding makes it unnecessary for the Chamber to analyse whether Abdallah Banda and Saleh Jerbo can also be held responsible for having committed the crimes charged through their troops, that is as indirect co-perpetrators, as alternatively charged by the Prosecutor.

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[277] ICC-01/04-01/06-803-tEN, para. 367.
[278] *See* supra para. 141-142.
[279] *See* Ibid.
[280] *See* supra paras. 146, 147 and 148.

X. FINDINGS OF THE CHAMBER

163. In light of the above, the Chamber finds that there are substantial grounds to believe that both the objective and the subjective elements of the crimes charged in Counts 1, 2 and 3 are fulfilled and that there are substantial grounds to believe that Abdallah Banda and Saleh Jerbo can be held criminally responsible as direct co-perpetrators for all the crimes as charged.

164. In light of the suspects' waivers[281] of their right to be present at the confirmation hearing and to have the proceedings (or part thereof) translated into Zaghawa, as well as of the Defence's statement at the confirmation hearing that it wished the pre-trial stage to be completed as expeditiously as feasible, the Chamber takes the view that the five-day deadline provided under rule 155(1) of the Rules to lodge an application for leave to appeal this decision shall start to run with effect from the date of the notification of the authoritative English version to the parties.

FOR THESE REASONS, THE CHAMBER

DECIDES

that the charges brought against Abdallah Banda and Saleh Jerbo are confirmed and to commit them to a Trial Chamber for the trial on the charges as confirmed, pursuant to article 61(7)(a) of the Statute;

ORDERS

the Registrar to notify the present Decision to (i) the UN Security Council; (ii) the Host State authorities; and (iii) the Sudanese authorities.

[281] [REDACTED]; [REDACTED].

Done in both English and French, the English version being authoritative.

/signed/

Judge Cuno Tarfusser

Presiding Judge

/signed/

Judge Sylvia Steiner

/signed/

Judge Sanji Mmasenono Monageng

Dated this Monday, 7 March 2011

At The Hague, The Netherlands